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SINCLAIR'S

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# DIVISION COURT LAW,

—1885,—

BEING A COMPREHENSIVE ANNOTATION OF THE DIVISION  
COURTS AMENDMENT ACT OF 1885,

—TOGETHER—

WITH A FULL DISCUSSION OF THE GENERAL SUBJECT OF  
DIVISION COURT LAW,

—AND—

THE INTRODUCTION OF SEVERAL STATUTES BEARING A CLOSE  
RELATION TO THE GENERAL PRACTICE OF DIVISION  
COURTS:

—BY—

J. S. SINCLAIR, Q. C.,

*Judge of the County Court and Local Judge of the High Court of Justice at Hamilton.*

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HAMILTON:

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Entered according to an Act of the Parliament of Canada, in the year of our Lord one thousand eight hundred and eighty-five, in the office of the Minister of Agriculture, by JAMES SHAW SINCLAIR, Q. C., Judge of the County Court and Local Judge of the High Court of Justice at Hamilton.

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TO  
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JUDGE DEACON,

Of Pembroke,

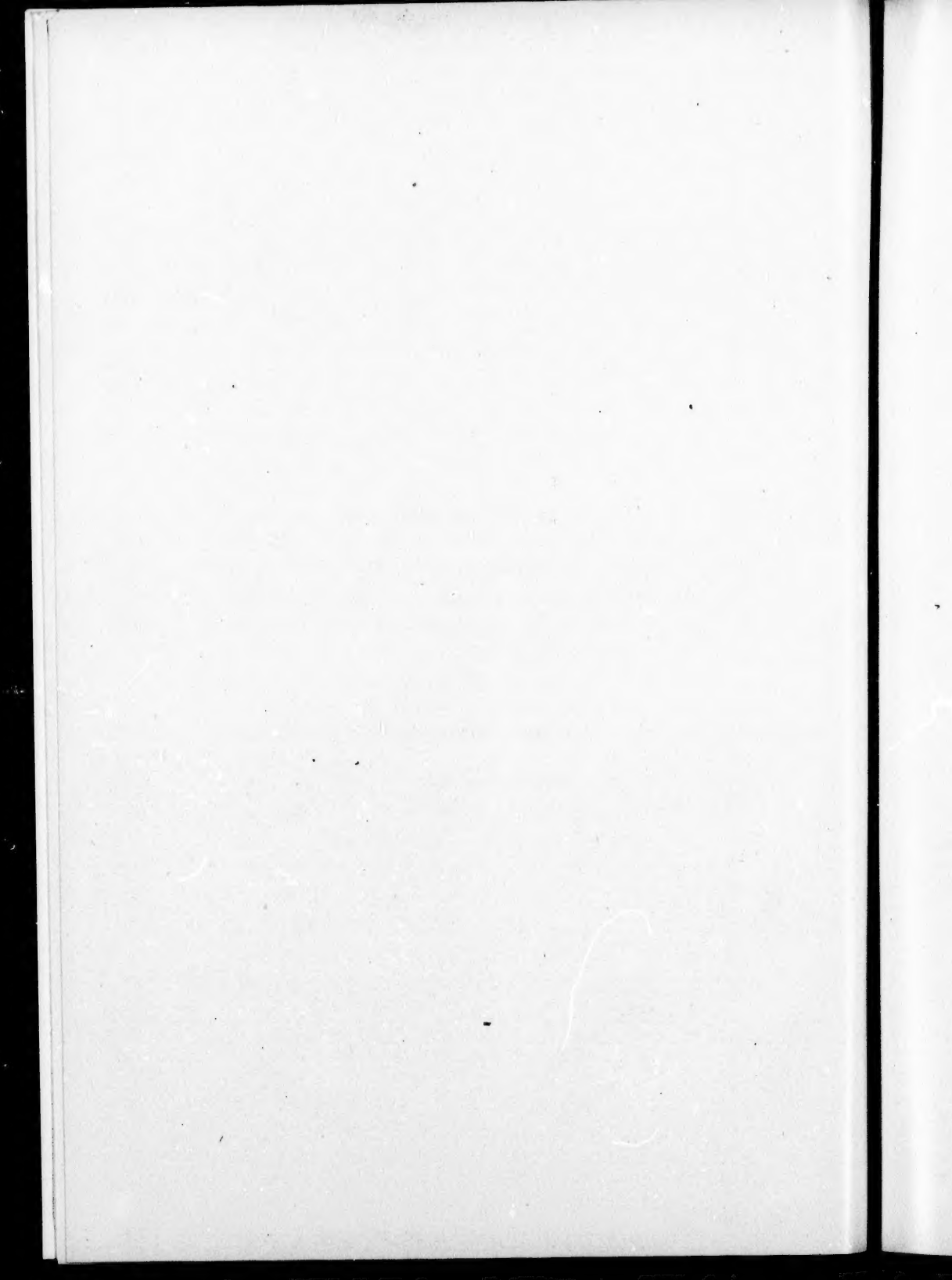
This Work

—IS,—

WITH HIS PERMISSION,

*Respectfully Inscribed.*





## PREFACE.

THE Amendment to the Division Courts Acts and the other legislation of the last session of the Provincial Legislature appeared to the writer to render such a work as is here presented eminently necessary. He has earnestly striven to elucidate and explain the subjects of such legislation with as much fullness and accuracy as their importance appeared to demand, and also to throw as much light as possible on the general subject of Division Court Law. It is hoped that the full discussion to be found of the subjects of Replevin and Interpleader will be of much practical value to the profession and others. Many subjects which have to be considered in the daily administration and practice of Division Court Law will be found discussed and considered. Several Statutes of practical value have been either introduced or appended, so as to render a ready reference to them always easy and convenient.

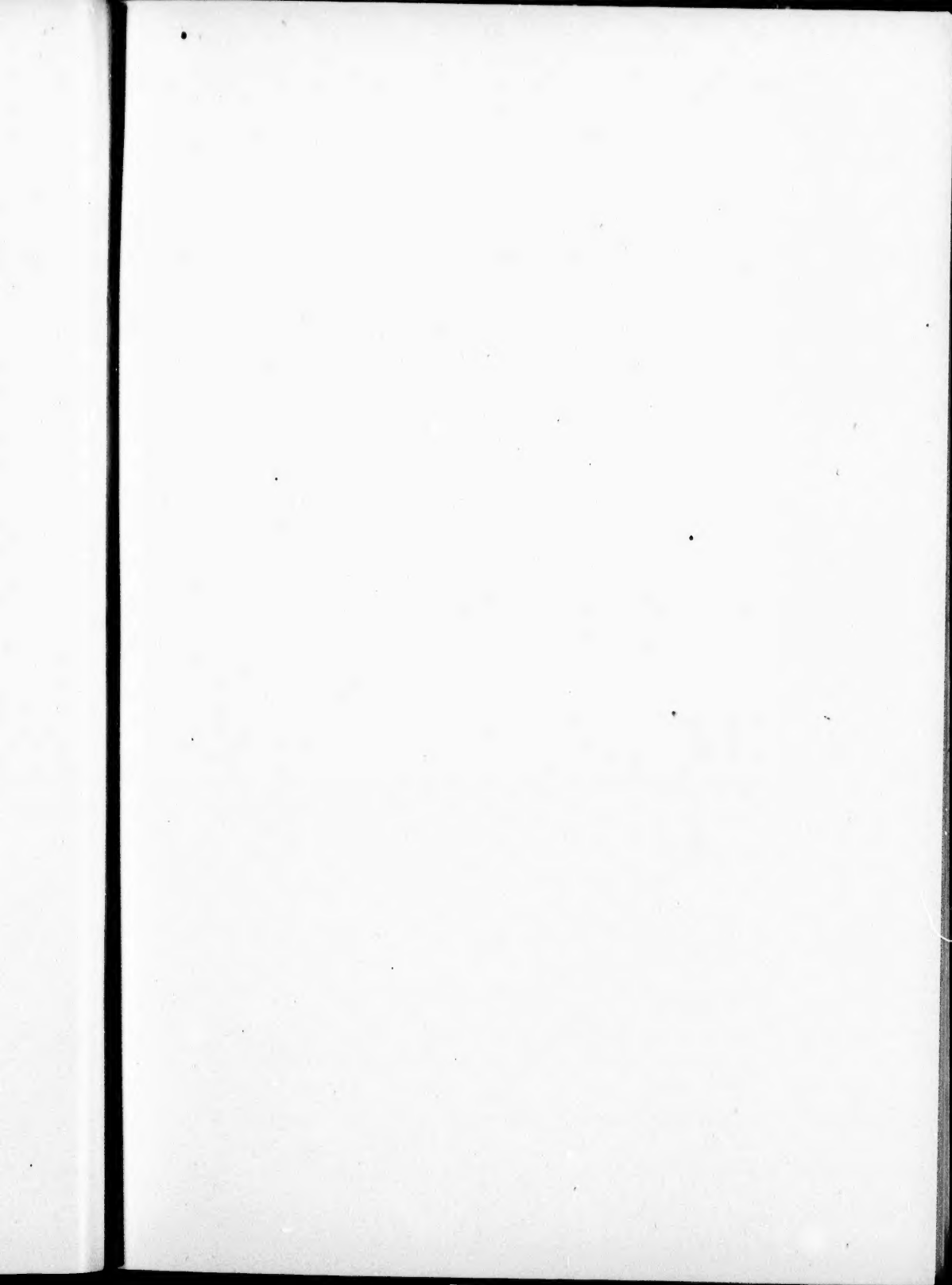
The writer again asks that kindly forbearance and consideration of the reader for all defects and omissions herein, which his previous efforts have hitherto received. An earnest endeavor has been made to produce a work which will be of practical utility; not only to the legal profession, but to

Division Court officers as well. Whether that has been accomplished or not must be left to the judgment and determination of kindly and critical readers.

The kindly assistance given by some of the brother Judges of the writer, and by members of the profession, is here gratefully acknowledged. There could not have fallen into better hands the preparation of the Index of Subjects and the List of Cases than to Mr. Edward Herbert Ambrose, of Hamilton, Student-at-Law, whose wonderful aptitude for such work has produced these exceedingly full and accurate parts of this book. The writer desires here to express his grateful thanks for these contributions which form such a necessary and important part of the work.

J. S. SINCLAIR.

HAMILTON, October, 1885.



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THE  
DIVISION COURTS AMENDMENT ACT, 1885.

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*Chapter 14, (Ontario.)*

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AN ACT TO FURTHER AMEND "THE DIVISION  
COURTS ACT."

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[Assented to 30th March, 1885.]

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HER MAJESTY, by and with the <sup>43 V. c 8,  
s. 14, amended.</sup> advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Section 14 of The Division Courts Act, 1880, is hereby amended (a) by adding thereto the words following:—

(b) "And every such notice shall be in writing; (c) and prohibition to a Division Court shall not lie in any such suit from any Court whatever, (d) where



such notice disputing the jurisdiction has not been duly given as aforesaid."

(a) THE INTERPRETATION OF STATUTES.

In commencing to comment on an amending and remedial Statute like this, it will not be out of place to recall to the mind of the reader a few of the cardinal rules by which judicial construction is placed upon all Statutes. Like every other branch of law, it was found necessary in the early history of English jurisprudence to lay down certain rules or canons of statutory construction, which, though not altogether uniform or consistent as discussed by different minds and decided by different Judges, in the main, come down to us unchanged and as fresh as when expounded by Lord Mansfield a century ago. By gaining an understanding of these rules, which are a guide to us in the proper view to be taken of our written laws, can the highest duty of advocate or Judge only be performed. In the exposition of all law the most eminent will find that other minds have considered and other tongues have expressed its meaning and elucidated its principles much better and clearer than they can ever hope to do. From the legal sages of the past more than the distinguished Judges and jurists of the present do we draw our highest conceptions of law. To the former particularly do we owe almost entirely the wise rules which obtain and the principles to be observed in the construction of all Statutes. To the present race of Judges we owe the enlarge-

ment of those rules to meet the necessities of an advanced and progressive age, and the ever recurring requirements of mankind, and that enlightened exposition of principle by which only all laws are truly construed or administered and justice attained.

It is proposed in the following extracts taken from the well-known authority on the construction of Statutes by Sir Fortunatus Dwarries, edited by Mr. Justice Potter, of the Supreme Court of the State of New York, to give in the words of the text some of the cardinal rules to be observed and principles to be deduced on that subject. There will also be found a citation of some of the latest cases on points that frequently arise, and the meaning to be placed in that large part of our jurisprudence, the written law.

At pages 38 and 39 of the work just mentioned it is said: "That a nation's progress in morality, philosophy, letters, arts, science, trade and commerce, civilization and refinement, may be pretty accurately ascertained from their written or Statute laws. Their spirit should, and doubtless does, enter into the language in which they are drawn. Just in proportion as these laws are grounded in natural justice, and speak a language, evincing moral and intellectual progress, they exalt and adorn the character of her people.

"In our own, as in every system of jurisprudence, the Statute law forms but a part of the law of the system; and it may be safely asserted, that no system of jurisprudence would be perfect, that should be confined to legislative enactments. It

is not within the power of the human mind, or in any combination of minds, to foresee and provide rules beforehand, to regulate the conduct of men in every change and variety of circumstances and conditions, so that when individuals neglect, or violate rules thus prescribed, the departure from right, finds its exact description, and finds a recognized rule to be applied to it, which shall restore the legal relations of the parties. Therefore it follows, that the laws of every community, consist of two elements. *First*, those rules of conduct which are introduced by the law-making power in an express and positive form; which control the particular cases and circumstances to which they relate or describe, and which are called Statutes, made by legislation; and *Second*, those precepts of natural right which are not superseded by Statute law, and which, therefore, remain in full force as to all other circumstances and cases, and which forever continue in force as the measure of justice until superseded or changed by legislation; and while in force, controlled by the rudiments of legal science and the profoundest of human wisdom and experience, remain at all times the highest security and protection of the citizen.

Perhaps in no feature of a nation's character, more than in her written laws, is her moral and industrial character made manifest. They indicate the progress of her civilized development, by their relative fitness and simplicity; and they afford materials for forming a judgment as to her lettered skill and intellective wisdom. Next to inspired revelation, the book which contains a nation's laws,

is most important. From this, the citizen learns the extent of his rights, and the nature of his political and social duties. In a country which has adopted it as one of its maxims, that "ignorance of law excuses nobody," it should be the aim of the lawmaker, that its Statutes should be drawn in language clear and simple; that their meaning should be plain and unmistakeable; and if ambiguity or doubt do seem to appear; its maxims and rules of interpretation should be formed in the soundest wisdom."

In speaking of the meaning to be given to the same word occurring in different places, the learned author says at pages 195 and 196: "According to Vattel, it is by no means a correct rule of interpretation, to construe the same word in the same sense wherever it occurs in the same enactment. "It does not follow," he says, "either logically or grammatically, that, because a word occurs in one section with a definite sense, that therefore the same sense is to be adopted in every other section in which it occurs. The framers of laws do not weigh only the force of single words, as philologists and critics, but of whole clauses and designated objects, as statesmen and practical reasoners. In common language the same word has often various meanings." The peculiar sense in which a word is used in any section is to be determined by the context. Words used in a consolidation Act may have a different meaning from that of the same words when used in any of the Acts comprehended. If the words of a Statute are plain, they must be strictly followed; but if

they are ambiguous, the whole context must be looked to for their explanation.

"The correct rule is to construe Acts of Parliament according to their grammatical and natural sense, unless the context show clearly that a different sense was intended."

In giving effect to the words used in the enacting clause, the author says at page 198: "It is a safe method of interpreting Statutes to give effect to the particular words of the enacting clauses. For when the legislature in the same sentence uses different words, the courts of law will presume that they were used in order to express different ideas. So, if there be a material alteration in the language used in the different clauses, it is to be inferred that the legislature knew how to use terms applicable to the subject matter. "The several inditing and penning of the different branches," said the Judges in Edrick's Case, "doth argue that the maker did intend a difference of the purview and remedies."

So also it is said at page 199: "It is a rule of construction, founded in reason and supported by many authorities, that words in a will or Statute are to be construed according to their strict and proper acceptation, unless there be something to show that such a construction is not intended. Words of known legal import are to be considered as having been used in their technical sense, or according to their strict acceptation, unless there appear a manifest intention of using them in their popular sense."

Against the danger of importing into Statutes

language not there used, the author says at pages 199 and 200: "Every day," said Patteson, J., in a late case, "I see the necessity of not importing into Statutes, words which are not to be found there. Such a mode of interpretation only gives occasion to endless difficulties. In *Lamond v. Eiffe*, 3 Q. B. Rep. 910, Lord Denman said, "We are required to add some arbitrary words to the section, which would exclude us from acting in certain cases. We cannot introduce any such qualifications; and I cannot help thinking that the introduction of qualifying words in the interpretation of Statutes is frequently a great reproach to the law. None of the distinctions suggested are contained in the plain words of the Act, and we cannot qualify them by any arbitrary introductions." So, in *Everett and Mills*, 4 Scott, N. C. 531, Tindal, C. J., said, "It is the duty of all Courts to confine themselves to the words of the legislature; *nothing adding thereto, nothing diminishing*. We must not import into an Act a condition or qualification which we do not find there."

Again, he says at page 201: "In construing the words of an Act of Parliament, and collecting from them the intentions of the legislature, the terms are always to be understood as having a regard to the subject matter; for that, it is to be remembered, will always be in the eye of the framer of the law, and all his expressions directed to that end." To this the American editor adds: "Whenever any words of a Statute are doubtful or obscure, the intention of the legislature is to be resorted to, in order to find the meaning of the words.

The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded,—from the end in view,—or the purpose which was designed; the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not only within a like reason: *United States v. Freeman*, 3 How. U. S. R. 565."

At page 203 it is said by the American editor that: "The words of a Statute, if of common use, are to be taken in their natural, plain, obvious and ordinary signification; and it is an established rule in giving construction to a Statute, first to ascertain its intent. This may be determined from the language of the whole, and every part of the Statute; and sometimes from the cause or necessity of making the Statute. When ascertained, it should be followed with reason and discretion; though such construction may seem contrary to the letter of the Statute, for it is the *intent* which often gives meaning to words otherwise obscure and doubtful. A thing which is within the intention of the makers of a Statute, is as much within the Statute as if it were within the letter; and a thing which is within the letter, is not within the Statute, unless it be within the intention of the makers: *Holmes v. Carley*, 31 N. Y. R. 290; *Chase v. N. Y. C. R. R. Co.*, 26 N. Y. 523. But all the provisions of the Statute to this end should be taken into consideration, and no interpretation should be given

confined to a part of the Statute, or to a separate section alone: *Newell v. The People*, 7 N. Y. R. 97."

The author, in speaking of a literal interpretation of Statutes, remarks at page 212: "In the construction of a Statute, it is the office of an expositor to put such a sense upon the words, that no innocent person shall receive any damage by a literal construction. Where a Statute will bear two interpretations, one contrary to plain sense, the other agreeable to it, the latter shall prevail. If words literally understood, bear only a very absurd signification, it is necessary to deviate a little from their primary sense; and Blackstone admits, that if, out of Acts of Parliament, there arise, collaterally, any absurd consequences, manifestly contradictory to common reason, Acts are, with regard to those collateral consequences only, held void. Such cases, indeed, are excepted out of the Statute by common sense, and the nonsensical words are said to be "controlled by the common law."

The views of the late Justice Story, on the construction of Statutes from impolicy or inconvenience, are expressed at page 215, in the language of that great Judge: "Arguments," says Story, "drawn from impolicy or inconvenience, ought to have little weight. The only sound principle is to declare *ita lex scripta est*, to follow and to obey. Nor if a principle so just could be overlooked, could there be well found a more unsafe guide in practice, than mere policy and convenience. Men, on such subjects, complexionally differ from each other; the same men differ from themselves at different times. The policy of one age may ill suit



the wishes or the policy of another. The law is not to be subject to such fluctuations."

At the same page it is said: "It remains to illustrate the rule—that effect cannot be given to an intention not expressed.

"Of this rule there seem to be two branches. The first instance that may be stated, is, where the legislature may have intended to provide for a particular case, and yet not have carried its intention into effect. "We can only say of the legislature," said Lord Ellenborough in *Rex v. Skone*, "*quod voluit non dixit*," 6 East, 518. "If the legislature intended more," said Lord Denman, in *Haworth v. Ormerod*, 6 Q. B. R. 307, "we can only say, that according to our opinion, they have not expressed it."

"Again, the subject may have been entirely overlooked by the legislature. A *casus omissus* can in no case be supplied by a Court of Law, for that would be to make laws. Judges are bound to take the Act of Parliament as the legislature have made it."

In the case of *The Caledonian Ry. Co. v. North British Ry. Co.*, 6 App. Cas. 114, Lord Selborne says, that the mere literal construction of a Statute ought not to prevail, if it is opposed to the intention of the legislature, as apparent by the Statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. See also *R. v. Washington*, 46 U. C. R. 221, 229. A reasonable construction should be given to an Act of Parliament. In the case of *The Countess of Rothes v. Kirkcaldy Water-*

*works Commissioners*, 7 App. Cas. 694, Lord Blackburn says at page 702: "I quite agree that no Court is entitled to depart from the intention of the legislature, as appearing from the words of the Act, because it is thought unreasonable. But when two constructions are open, the Court may adopt the more reasonable of the two."

As to the hardship consequent on a certain interpretation of an Act of Parliament, Lord Justice Bramwell says, in the case of *Ex parte Banco de Portugal, In re Hooper*, 11 Ch. D., at page 322: "I think, as I have had occasion to say more than once, that when a particular construction of an Act of Parliament, or a particular proposition of law, leads to hardship, there is a presumption against that construction or proposition being right, because I do not think that our law does, usually at least, lead to hardship."

The marginal notes to the sections of an Act of Parliament are not to be taken as part of the Act: *Sutton v. Sutton*, 22 Ch. D. 511; *Claydon v. Green*, L. R. 3, C. P. 511.

Sometimes the popular and not the etymological meaning is to be given to an expression in a Statute. For instance, in *Gordon v. Jennings*, 9 Q. B. D., at page 45, it was held, that, though the term "wages" in an etymological sense meant any compensation for services, yet, that the popular meaning should be looked to, and that it could not be held to apply to the remuneration of a high or important officer of the state, or a company, for instance, but to that of domestic servants, laborers, and persons of a similar description.

In *Bennett v. Atkins*, 4 C. P. D., at page 88, Lord Coleridge, C. J., says: "I am reluctant to be led into the consideration of what is called *intuitus*, or purpose, or spirit of an Act of Parliament, when such consideration would compel me to do violence to the words of it."

The late Chief Justice Moss, in the case of *In re Code and Crain*, 3 App. R., at page 560 says: "That where the language of the legislature is fairly susceptible of two different meanings, that should be preferred which excludes and prevents consequences that are mischievous and unjust."

As to the effect of the title or preamble of an Act on the enacting clause, the reader is referred to *R. v. Washington*, 46 U. C. R. 221, and the cases there cited.

In penal Statutes, questions of doubt are to be construed favorably to the accused: *McCaskill v. Paxton*, 1 Hodgins, E. C. 304.

In *Ex parte Walton*, *In re Levy*, 17 Ch. D. 746, in appeal, it was laid down by Jessel, M. R., that a Statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention. See also *Grey v. Pearson*, 6 H. L. C. 106.

The speech of the Lord Chancellor in the House of Lords during debate on a measure, was held authority for interpretation of an Act of Parliament: *R. v. Bishop of Oxford*, 4 Q. B. D. 525; *Smiles v. Belford*, 1 App. R. 436.

A *general* Act does not repeal a previous *particular*

Act, unless there is some express reference to previous legislation, or unless the two Acts are necessarily inconsistent: *Thorpe v. Adams*, L. R. 6 C. P. 125; *L. C. & Dover Ry. Co. v. Board of Works*, L. R. 8 C. P. 185; *Hill v. Hall*, 1 Ex. D. 411; *Conservators of the Thames v. Hall*, L. R. 3 C. P. 415.

The headings of different portions of a Statute are to be referred to, to determine the sense of any doubtful expression in a section ranged under any particular heading: *Hammersmith and City Ry. Co. v. Brand*, L. R. 4 H. L. 171.

A saving clause in a general Act has no operation if it is inconsistent with the express provisions of a subsequent special Act: *Corporation of Yarmouth v. Simmons*, 10 Ch. D. 518.

*Prima facie*, an English Statute affects only English subjects, or foreigners who come either permanently or temporarily within the allegiance of the English Crown: *Ex parte Blain, In re Sawers*, 12 Ch. D. 522.

When a recital in an Act of Parliament is a confirmation of title: see *Howard v. Earl of Shrewsbury*, L. R. 2 Ch. 760.

The words "herein contained" were held to have application only to the clause in which they were contained, and not to the whole Act: *McGill v. Peterborough*, 12 U. C. R. 44.

The word "section" does not necessarily mean one of the divisions of the Act, numbered as such, but may refer, if the context requires it, to any distinct enactment, of which there may be several included under one number: *Dain v. Gossage*, 6 P. R. 103.

As to how the different Statutes of the R. S. O. may be treated, see *Whelan v. The Queen*, 28 U. C. R. 108; *Boston v. Lelievre*, L. R. 3 P. C. 162. *per* Lord Westbury.

The divisions of a Statute, under which the clauses are arranged and classified, may be looked to as affording a key to the construction: *Lawrie v. Rathbun*, 38 U. C. R. 255.

Statutes regulating the practice and procedure of a Court, only apply to matters within its jurisdiction, and cannot be called in aid to give jurisdiction where it is in question: *Ahrens v. McGilligat, G. T. Ry. Co.* Garnishees, 23 C. P. 171.

The rule that when a Statute has received a construction, either from long practice or by judicial interpretation, and is afterwards re-enacted in the same terms, the legislature is deemed to have had that construction in view in the re-enactment, does not apply to Dominion legislation where different constructions obtained in different Provinces: *Davidson v. Ross*, 24 Grant 22; *R. v. Whelan*, 28 U. C. R. 27, 43; *Nicholls v. Cumming*, 1 Sup. R. 395; *Crain v. Coll. Institute of Ottawa*, 43 U. C. R. 498.

Courts are bound to take judicial notice of every public Act of the Provincial legislature, though its operation may be limited: *Darling v. Hitchcock*, 25 U. C. R. 463.

In private Acts of Parliament the interests of persons not named are unaffected: *Re Goodhue*, 19 Grant 366.

Where a colonial legislature has passed an Act in the same terms as an Imperial Statute, and the

latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the Courts of the colony : *Trimble v. Hill*, 5 App. Cas. 342 ; *Catterall v. Catterall*, 9 Jur. 951.

In construing an obscure clause in an Act of Parliament, the Court may look at the title for assistance : *Greene v. Pro. Ins. Co.*, 4 App. R. 521. So also may the headings of a Statute be referred to, to assist the construction : *Donly v. Holmwood*, 4 App. R. 555.

Where a penalty is imposed by an Act of Parliament upon any transaction, the transaction will be illegal, though it is not expressly prohibited by the Act : *In re Cork & Youghal Ry. Co.*, L. R. 4 Ch. 748.

The meaning of particular words in a Statute, in the absence of express definition, "is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained" : *Per Abbott*, C. J., in 1 B. & C. 136, approved of in the case of *The Lion*, 6 Moore, P. C. 163, 171.

For authorities generally, bearing on the question of statutory construction, see Dwarris on Statutes, by Potter ; Maxwell on Statutes ; Fisher's Digest, 8206-8240 ; Rob. & Joseph's Digest, 3654-3667 ; L. R. Digest, (1880), 4091.

An Act comes into force from the earliest moment of the day of its receiving assent, or of the day named for its commencement : *Tomlinson v. Bullock*, 4 Q. B. D. 230. See Potter's "Dwarris on Statutes," 100, note 3.

*(b)* THE TEXT OF THE SECTION.

Section 14 of the Division Courts Act, 1880, with the amendment here made, will therefore read as follows: "In all cases where a defendant, primary debtor or garnishee, intends to contest the jurisdiction of any Division Court to hear or determine any cause, matter or thing in such Court, he shall leave with the Clerk of the Court, within eight days after the day of service of the summons on him (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen or twenty days before the return), a notice to the effect that he disputes the jurisdiction of the Court, and such Clerk shall forthwith give notice thereof to the plaintiff, primary creditor, or their attorney or agents, in the same way as notice of defence is now given; and in default of such notice, disputing the jurisdiction of such Court, the same shall be considered as established and determined, and all proceedings may thereafter be taken as fully and effectually as if the said suit or proceeding had been properly commenced, entered or taken in such Court; [and every such notice shall be in writing; and prohibition to a Division Court shall not lie in any such suit from any Court whatever, where such notice disputing the jurisdiction has not been duly given as aforesaid.]"

At pages 31 and 34 of Sinclair's D. C. Act, 1880, will be found the views of the writer on the section as it originally stood, to which reference is now simply made.

## (c) NOTICE TO BE IN WRITING.

It may be argued that if the defendant was obliged to "leave with the Clerk of the Court" a notice to the effect that he disputed the jurisdiction of the Court, as required by the 14th section of the Act of 1880, that he could only do so by a *written* notice. But *leaving* a notice is nothing more than *giving* it. In the case of *Rea. v. The Justices of Salop*, 4 B. & Ald. 626, 629, Bayley, J., says in regard to the giving of a notice of appeal under a Statute which did not prescribe the notice to be in writing: "It may be convenient that a notice of appeal, particularly where it is a notice of the cause and matter of the appeal, should be in writing, and in many cases the Statute giving the appeal requires that there should be a written notice; but we cannot say that a notice in writing is necessary, where it is not required to be in writing by the clause of the Statute which directs a notice to be given." Under another Statute giving the right of appeal, the same opinion was expressed in *Rea. v. The Justices of Surrey*, 5 B. & Ald. 539. At page 540, Abbott, C. J., says: "We are of opinion that where a Statute requires reasonable notice to be given, it does not necessarily mean that the notice should be in writing, but only that as to time and number of days it should be reasonable." As enunciated of the same view, reference may be made to *R. v. The Justices of Huntingdonshire*, 19 L. J. M. C. 127; *R. v. Nichol*, 40 U. C. R. 76; *Kettlewell v. Watson*, W. N. 1883, 102; *Ex parte Nickoll*, *In re Walker*, 13 Q. B. D. 469; *Smith v. Young*, 1 Camp. 440. Although such notice might have been



given orally, it would have had to be given formally and deliberately, and with the intention of giving notice: *Lucas v. Dicker*, 6 Q. B. D. 84; *Ex parte Oastler, In re Edlander*, 13 Q. B. D. 471. Another reason for saying that the notice need not formerly be in writing, is that it was the inherent right at common law of every defendant to question the jurisdiction of any Court assuming to exercise any power or authority over his person or property, and that such right could only be denied by the clearest and most unequivocal legislative declaration of such an intention. In questions of jurisdiction affecting cases where the interests of suitors, as well plaintiffs as defendants, may be so seriously affected, it is fitting that some formal written notice should be placed on the files of the Court, determinative of the defendant's intention to question jurisdiction. The legislature, therefore, has wisely declared that such a notice shall be "*in writing*." It is not necessary that the notice should state any *grounds* for disputing jurisdiction, for the Statute does not require it: *R. v. Justices of Westmoreland*, 10 B. & C. 226; *R. v. Justices of Derbyshire*, 9 Jur. 181. It is not necessary that the notice should be signed: *R. v. Justices of Surrey*, 5 B. & Ald. 539; *Bennett v. Brumfitt*, L. R. 3 C. P. 28; *R. v. Nichol*, 40 U. C. R. 76; nor that it should be in any particular form, provided it gives the Clerk substantially the information that the defendant disputes the jurisdiction of the Court: *Harpham v. Child*, 1 F. & F. 652; *Low v. Owen*, 12 C. P. 101. As remarked by Lord Campbell in *Everard v. Watson*, 1 E. & B., at page 804: "Is

not that a sufficient notice which conveys to any person of reasonable understanding the knowledge of the requisite facts?" Reference may also be made to *Paul v. Joel*, 4 H. & N. 355; *Bain v. Gregory*, 14 L. T. N. S. 601; *Aldridge v. Medwin*, L. R. 4 C. P. 464; *Allen v. Geddes*, L. R. 5 C. P. 291; *Helps v. Eno*, 9 U. C. L. J. 302; *Lanark & D. Plank R. Co. v. Bothwell*, 2 U. C. L. J. 229. It is important that the notice should be left with the Clerk within the prescribed time, for if not the Judge could not extend the time for doing so: *Brown v. Shaw*, 1 Ex. D. 425; *Tennant v. Rawlings*, 4 C. P. D. 133; *Whistler v. Hancock*, 3 Q. B. D. 83; *In re The Prescott Election*, 9 P. R. 481; *Barker v. Palmer*, 8 Q. B. D. 9. The notice could be left with the Clerk on Good Friday or other holiday: *Clarke v. Fuller*, 2 U. C. R. 99; but it should not be left on a Sunday, though probably if it was the notice would avail for the following Monday: *R. v. Leominster*, 2 B. & S. 391. If the notice should be transmitted to the Clerk by mail, it should, in order to be effectual, reach the Clerk within the proper time: *Robson v. Arbuthnot*, 3 P. R. 315; and be accompanied with the proper fees.

After the Clerk receives the notice, he is required to notify the plaintiff, primary creditor, or his solicitor or agent *forthwith*, of the jurisdiction being disputed: D. C. Rule 88; and by Rule 180, if the notice is sent by post the letter must be registered.

When a Statute declares that an act must be done "*forthwith*," it excludes the intervention of delay: Potter's *Dwarris on Statutes*, 289; and

means "prompt, vigorous action, without any delay": *R. v. Justices of Berkshire*, 4 Q. B. D. 471; *Ex parte Lamb*, *In re Southam*, 19 Ch. D. 169; *McLellan qui tam v. Brown*, 12 C. P. 542; *In re Lake and The Corporation of Prince Edward*, 26 C. P. 173; *Ex parte Williams*, *In re Jones*, W. N. 1882, 47. Should the Clerk omit to do so, he would be liable for any damage that either party could prove he had sustained in consequence of such default: *Parks v. Davis*, 10 C. P. 229; *Henly v. Mayor of Lyme*, 5 Bing. 108; *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 251; *Rogers v. Dutt*, 13 Moo. P. C. 209; *Carey v. Lawless*, 13 U. C. R. 285. An action would also be maintainable against his sureties on their statutory covenant: *Nerlich v. Malloy*, 4 App. R. 430.

But if the Clerk omitted to give the notice required, neither party's rights *in the suit* would be prejudiced by it. A party to a suit cannot be prejudiced by the act of an officer of the Court: *Arch. Pract.* 12 Ed. 363, 1557.

Should it be impossible for a party to leave with the Clerk a notice disputing the jurisdiction, owing to the absence of the Clerk, or a like cause, the defendant, or primary debtor, as the case may be, would not be debarred of his right. See *Sinclair's D. C. Act, 1880*, p. 19 (*u*), and cases there cited. *Grant v. Holland*, W. N. 1880, 156; *Ex parte Luxon*, *In re Pidsley*, 20 Ch. D. 701.

It will be observed that the notice disputing jurisdiction must be left with the Clerk "within eight days (or twelve days) *after* the day of service of the summons." The day of service is excluded from the reckoning: *Young v. Higgon*, 6 M. & W.

49; *McCrea v. Waterloo M. F. Ins. Co.*, 26 C. P. 437 S. C. 1 App. R. 218; *Ex parte Whitton, In re Greaves*, 13 Ch. D. 881; *Weeks v. Wray*, L. R. 3 Q. B. 212; *Lawford v. Davies*, 4 P. D. 61; *Young v. O'Reilly*, 24 U. C. R. 172.

If the last of the eight (or twelve) days should fall on a Sunday, it is more than doubtful if the following Monday could be reckoned the last day: *Rouberry v. Morgan*, 9 Ex. 730; *Peacock v. The Queen*, 4 C. B. N. S. 264; *Wynne v. Ronaldson*, 12 L. T. N. S. 711; *Ex parte Ferrige, In re Ferrige*, L. R. 20 Eq. 289; *Ex parte Viney, In re Gilbert*, 4 Ch. D. 794; *Ex parte Saffrey, In re Lambert*, 5 Ch. D. 365; *Ex parte Simpkin*, 2 E. & E. 392. In view of *Clarke v. Macdonald*, 4 Ont. R. 310, and *McLaughlin v. Bank of Ottawa*, 8 App. R. 543, the writer is of the opinion that the 457th Rule of the Ontario Judicature Act would not be applicable to this proceeding in a Division Court. The writer is also of the opinion that if Sunday was the last day it should be reckoned.

Should a Clerk refuse to perform any part of his duty in regard to such notice, such duty could be enforced by *Mandamus*. See Sinclair's D. C. Act, 48, and cases there cited. The necessity of a notice disputing the jurisdiction only arises where the cause is one triable in *some* Division Court. If it is beyond the jurisdiction of *any* Division Court, and is only suable in some *higher* Court, then a person questioning the jurisdiction of the Division Court in which the action is brought, could avail himself of that right, without giving any notice under this section: *In re Mead v. Creary*, 8 P. R.

374, 32 C. P. 1; *Manufacturers' and Merchants' M. F. Ins. Co. v. Campbell*, 1 C. L. Times 134.

The notice may be to the following effect :

In the            Division Court for the County of

A. B., PLAINTIFF,

v.

C. D., DEFENDANT.

You are hereby required to take notice that I dispute the jurisdiction of this Court to entertain and try this case.

Dated this            day of            A. D. 188 .

To A. B., the Plaintiff,	}	C. D., the Defendant.
and the Clerk of this		(Or E. F., Solicitor [or
Court.		Agent] for the Defendant.)

The notice to be given by the Clerk to the plaintiff or primary creditor can easily be framed from one of the Forms to be found at page 321 of Sinclair's D. C. Act.

(d) PROHIBITION NOT TO ISSUE.

When the 14th section of the Division Courts Act of 1880 was drawn, probably it was in the mind of the framer, that in all actions of the competence of any Division Court, no question of jurisdiction should be raised unless notice to that effect should be given, as the section directs. But the cases of *Jacobs v. Brett*, L. R. 20 Eq. 1; *Bridge v. Branch*, 1 C. P. D. 633; *Oram v. Brearey*, 2 Ex. D. 347; and *Clarke v. Macdonald*, 4 Ont. R. 310, since, were authority to shew that the prohibitive juris-

diction of Superior Courts over those of an inferior character was not taken away, except "by express language in, or obvious inference from, some Act of Parliament." In the last mentioned case it was held, that notwithstanding the absence of a notice under the 14th section of the Act of 1880, the jurisdiction of the High Court of Justice was not ousted of its original jurisdiction to prohibit proceedings in a Division Court in a matter beyond its jurisdiction. That, although the jurisdiction could not be questioned in the Division Court, because such notice had not been given, yet, the right of the High Court of Justice to interpose and prohibit the action was unaffected by the Statute.

But these cases, it is submitted, cannot now be considered law, because lately the Court of Appeal in England in construing a Statute not so strongly expressed in favor of the exclusive jurisdiction of the inferior Court, as is the 14th section of our Division Courts Act, 1880, overruled *Oram v. Brearey*, 2 Ex. D. 347, upon which *Clarke v. Macdonald*, 4 Ont. R. 310, was mainly founded, and pronounced in favor of the exclusive jurisdiction of the inferior Court, and refused prohibition: *Chadwick v. Ball*, W. N. 1885, 78.

The anomaly of the jurisdiction being taken away in the Division Court, and not in the High Court, as expressed in *Clarke v. Macdonald*, 4 Ont. R. 310, no doubt induced the legislature to interfere and pass this amendatory section; but in view of the recent decision just cited, it is questionable if this statutory provision was necessary. It will be observed that the words are, that prohibition to a

Division Court shall not lie, in the absence of notice disputing the jurisdiction "*from any Court whatever.*" Language could scarcely be broader to exclude the jurisdiction of any superior tribunal than is here employed.

The right to prohibit in such cases, except for this section, would probably, since the Judicature Act, belong to *all* the Judges of the several Divisions of the High Court: *Ex parte Lynch*, 1 Madd. 15; *In re Foster*, 3 Jur. N. S. 1238; *In re Bateman*, L. R. 9 Eq. 660; *Chambers v. Green*, L. R. 20 Eq. 552; *Hedley v. Bates*, 13 Ch. D. 498; Ontario Judicature Act, section 17, sub-section (8); *Jacobs v. Friedburg*, 21 W. R. 353.

The Court of Chancery formerly had power in certain cases to grant a writ of *certiorari*: *Davies v. Mac-Henry*, L. R. 3 Ch. 200. The Chancery Division of the High Court in this Province may, since the Judicature Act, have the right here: *R. v. Bunting*, 7 Ont. R. 118, *per* Armour and O'Connor, J. J., notwithstanding the 61st section of the Division Courts Act.

In the United States, the rule as to the issue of the writ of prohibition is pretty much the same as with us. It is not demandable as of right, but of sound judicial discretion: *People v. Westbrook*, 89 N. Y. 161.

The statutory provisions in this Province in reference to the issue of a writ of prohibition will be found at page 725 of the Revised Statutes of Ontario.

The general law of prohibition, as applicable to Division Courts, will be found pretty fully discussed

at pages 42, 47, of Sinclair's D. C. Act, but some cases not mentioned there, and some that have been decided since, may here be properly referred to.

Where a Judge has to find upon contradictory facts in order to determine whether he has jurisdiction or not, his decision cannot be reviewed by prohibition: *Joseph v. Henry*, 1 L. M. & P. 388; *In re Bowen*, 15 Jur. 1196; *Leaden and Munster Union v. Southgate* 10 Ex. 201; *Ex parte Vaughan*, L. R. 2 Q. B. 114; *Brown v. Cocking*, L. R. 3 Q. B. 672; *In re Jenkins v. Miller*, 20 L. J. N. S. 30; *Stephens v. Laplante*, 8 P. R. 52.

Where a change of venue, or transfer of a cause, is made under the 8th, 9th and 11th sections of the D. C. Act, 1880, the Judge of the Court from which the change or transfer is made would have no power over costs of the Court to which the transfer is made: *Moody v. Steward*, L. R. 6 Ex. 35; *Hares v. Lea*, L. R. 10 Eq. 683.

If the Court has no jurisdiction as to part of the proceedings, a partial prohibition may be granted: *Walsh v. Ionides*, 1 E. & B. 383; *Kerkin v. Kerkin*, 3 E. & B. 399.

Where a writ has to be served or executed against an officer of the Court, which he ordinarily would do himself, the Court has, from the necessity of the case, power to appoint another person to perform the act, and proceedings cannot be prohibited: *Bellamy v. Hoyle*, L. R. 10 Ex. 220.

The Judge of a Division Court would have no power on a motion before that Court for a new trial to direct judgment to be entered for either of the parties. His duty is to grant or refuse a new

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by act of 1884



trial: *Pryor v. The City Offices Co.*, 10 Q. B. D. 504.

By discontinuing an action, after a Counter-claim has been delivered, a plaintiff cannot put an end to it, so as to prevent the plaintiff from enforcing against him the cause of action contained in the Counter-claim: *McGowan v. Middleton*, 11 Q. B. D. 464.

Prohibition will not be granted in an action "for goods sold and delivered at the defendant's request, and upon accounts stated," if the evidence shews, or it can reasonably be assumed, that the account was stated within the jurisdiction: *Taylor v. Nicholls*, 1 C. P. D. 242. See also *Evans v. Nicholson*, 32 L. T. N. S. 778; *Taylor v. Jones*, 1 C. P. D. 87; *Bennett v. Cosgriff*, 38 L. T. N. S. 177.

It is questionable if prohibition will be granted where a Judge in the Division Court, at the trial of a cause, allows one particular item of the plaintiff's claim, forming in itself a separate cause of action, to be withdrawn, as being in contravention of Rule 8, prohibiting abandonment of excess at the trial: *Fitzsimmons v. McIntyre*, 5 P. R. 119; *Meek v. Scobell*, 4 Ont. R. 553, and cases there cited; *Ellis v. Fleming*, 1 C. P. D. 237; *Winger v. Sibbald*, 2 App. R. 610; *In re Higginbotham v. Moore*, 21 U. C. R. 336.

It is no ground for prohibition that a Judge received as evidence that which he should not have received: *In re Brown*, 8 L. J. N. S. 81.

If any other tribunal having jurisdiction has adjudicated upon the merits of a case, the Division Court would be prohibited from entertaining it: *Millett v. Coleman*, 33 L. T. N. S. 204.

A cause cannot be tried unless the defendant has the proper length of notice before Court, and if the summons is served *one day* too late for the first sittings, the cause cannot be tried then, and if it is, in defendant's absence, or against his will, prohibition will be awarded: *Zaritz v. Mann*, 16 L. J. N. S. 144; *Barker v. Palmer*, 8 Q. B. D. 9 and 11; *Hudson v. Tooth*, 3 Q. B. D. 46.

A prohibition will not be granted for failure to comply with Rules of Practice: *Fee v. McIlhargey*, 9 P. R. 329.

There is no reason for prohibition pending an appeal to the Court of Appeal: *Wiltsey v. Ward*, 9 P. R. 216, 8 App. R. 549.

Prohibition will not lie to a Division Court, no matter how erroneous the decision may be, where there is jurisdiction: *Sinclair's D. C. Law*, 1884, 216, 217.

The writ of prohibition is sometimes discretionary: *Re Friendly v. Needler*, 10 P. R. 267.

A prohibition may go in the first instance without the question of jurisdiction being raised by any proceeding in the Division Court, but when a party applies without having raised the question in the Court below, he will not be allowed costs: *Nerlich v. Clifford*, 6 P. R. 212; but see *In re Dixon v. Snarr*, 6 P. R. 336.

The writ will not be granted on mere matters of practice: *Ellis v. Watt*, 8 C. B. 614; *Re McLean v. McLeod*, 5 P. R. 467; *Fee v. McIlhargey*, 9 P. R. 329; *Sinclair's D. C. Law*, 1884, 103.

Although the protest fees on a promissory note make the claim beyond \$100, yet, the jurisdiction

of the Division Court is not ousted: *Burns v. Rogers*, 17 L. J. N. S. 209; *McCracken v. Creswick*, 8 P. R. 501; *In re Widmeyer v. McMahon*, 32 C. P. 187.

Where a defendant living in the County of Bruce applied by letter written there for a loan from the plaintiffs, at London, it was held that defendant could not be sued at London: *English Loan Co. v. Harris*, 17 L. J. N. S. 171.

There is no power of a Division Court Judge to try a question of warranty where the damages claimed exceed \$100: *Re Lindsay v. Morrison*, 18 L. J. N. S. 444.

Money mailed at Ottawa to Hamilton, where the defendants' place of business was, and where the money was received, cannot be sued for in the Division Court at Ottawa: *Re Gurland v. Omnium Securities Co.*, 19 L. J. N. S. 395.

The Division Court has no power to entertain a claim beyond \$100, unless the amount is definitely ascertained by the signature of the defendant, or some statutory right is given: *Wiltsie v. Ward*, 8 App. R. 549; *Forfar v. Climie*, 10 P. R. 90; but the amount need not be "ascertained" at the time of contract, but any time before action is brought: *White Sewing Machine Co. v. Belfry*, 10 P. R. 64; see *Munday v. Asprey*, 13 Ch. D. 855.

An assessment on a premium note made to a Mutual Fire Insurance Company, where the original amount is above \$200, and the amount of the assessment \$155.96, is not recoverable in the Division Court: *Man. & Mer. M. F. Ins. Co. v. Campbell*, 1 C. L. Times 134.

A cause can only be transferred from one Court

to another under section 11 of the Division Courts Act of 1880, where it is entered "by mistake or inadvertence" in the wrong Court, and if an order of transfer is made on any other ground prohibition will lie: *Hands v. Noble*, 3 C. L. Times 215.

Where the principal money on a promissory note *with interest* amounts to \$158, it is within the jurisdiction of the Division Court: *In re Widmeyer v. McMahon*, 32 C. P. 187; *McCracken v. Creswick*, 8 P. R. 501.

Proof of damage beyond the jurisdiction, does not oust the Court of jurisdiction, provided the amount claimed is within it: *Bodger v. Nicholls*, 28 L. T. N. S. 441.

A prohibition will be issued to restrain proceedings on a judgment recovered against an American citizen served with a summons out of the Province: *Ontario Glass Co. v. Swartz*, 9 P. R. 252.

A sum originally beyond the jurisdiction of a Division Court, no matter how large, and ascertained by the signature of the defendant, when reduced by payment to an amount not exceeding \$200, can be sued in the Division Court: *Bank of Ottawa v. McLaughlin*, 8 App. R. 543.

Part of a larger sum beyond the jurisdiction of a Division Court can be garnished in that Court: *In re Mead v. Creary*, 32 C. P. 1.

Money paid by a surety on a promissory note to an amount beyond \$100, and sought to be recovered in the Division Court, was held on application for prohibition to be beyond the jurisdiction, the cause of action being merely for money paid: *Kinsey v. Roche*, 8 P. R. 515.

Where a check is drawn within one Division on a bank situate in another Division, and dishonored, the drawer cannot be sued in the Division where the check was drawn, as for a cause of action that arose there: *King v. Farrell*, 8 P. R. 119.

Where legal services are performed at Toronto, under instructions by letter written in the County of Bruce, where the writer of the letter resides, the defendant cannot be sued for the fees due for such services at Toronto: *In re Hagel v. Dalrymple*, 8 P. R. 183. The residence of the defendant must be a *bona fide* residence: *Baker v. Wait*, L. R. 9 Eq. 103.

A primary creditor suing in a Division in which there would be no jurisdiction except in a garnishment proceeding, must prove a garnishable debt in the hands of the garnishee, otherwise he could not recover against the primary debtor: *In re Holland v. Wallace*, 8 P. R. 186.

A claim for salary, and another claim for money paid, can be sued in separate actions without contravention of the Statute as to splitting claims: *Richards v. Marten*, 23 W. R. 93.

Prohibition lies, where in an action for \$200 on a promissory note, accrued interest in addition thereto is allowed to the plaintiff: *Re Young v. Morden*, 10 P. R. 276.

Where an action within the jurisdiction of some Division Court is brought in a Division Court that properly has no jurisdiction to try the case, and it proceeds to judgment with the defendant's acquiescence, his right afterwards to move for prohibition is gone: *Robertson v. Cornwell*, 7 P. R. 297; *Re*

*Friendly v. Needler*, 10 P. R. 267; *Re Smart and O'Reilly*, 7 P. R. 364; *Archibald v. Bushey*, 7 P. R. 304; *In re Burrowes*, 18 C. P. 493; *Richardson v. Shaw*, 6 P. R. 296; *Re Merchants' Bank v. Van Allen*, 10 P. R. 348.

The commencement of a suit in the Division Court for part only of an entire claim, and endorsing an abandonment of the balance on the summons, is not *per se* a release of the excess; but the part so abandoned cannot be sued for after the recovery of judgment in such suit: *Winger v. Sibbald*, 2 App. R. 610.

A plaintiff cannot by making a person who is in his interest, and who resides within the jurisdiction of a certain Division Court, a defendant in a suit for the purpose of giving that Court jurisdiction. In order to give jurisdiction under the 62nd section of the Division Courts Act to a particular Court, by reason of one of the defendants residing within that Division, and the claim being otherwise necessarily suable elsewhere, it is submitted that such defendant must be a *bona fide* defendant, and not one who merely indorses a note, or otherwise becomes a party to the cause of action, for the object of assisting the plaintiff in the recovery in that Court, where such Court would not otherwise have jurisdiction. This question arose in the case of *Baker v. Wait*, L. R. 9 Eq. 103, under a similar clause in one of the English County Courts Acts. In delivering judgment of the Court, Sir W. M. James, then a Vice-Chancellor, says at page 106: "The real point here is, that these defendants do not reside within the jurisdiction of this County

Court. The object of the Statute was to bring justice home to the door of every man—that is to say, to the door of defendants. Here it is sworn that the substantial defendants live, two of them at Bournemouth, one at Plymouth, and another in another County Court district in Somersetshire, and the only defendant within the Gloucestershire district,” (in which the action was brought,) “is in the plaintiff’s interest. If a plaintiff having only, as he may be called, this “pocket” defendant of his own within this district, were to go on with a plaint filed in the County Court of the district in which none of the other defendants reside, I should not hesitate to say that all orders made in such a matter would be wholly void and of no effect.”

The case of *Bridges v. Douglas*, 13 L. J. N. S. 358, is at variance with the views above expressed in *Baker v. Wait*, but it must be observed that the attention of the learned Judge (Morrison, J.) who decided *Bridges v. Douglas*, was not called to the English case just referred to. It seems to the writer that to give jurisdiction in such a way would not only be a fraud on the other defendants, but on the Statute itself, and should not be permitted.

Prohibition will not be granted for the omission to make or file an affidavit of service of application for new trial within fourteen days after the day of trial: *Fee v. McIlhargey*, 9. P. R. 329.

It would appear to be as yet undecided whether an action for a claim not exceeding \$100, ascertained by the signature of the defendant, joined with an open account not exceeding that sum—in the whole

not more than \$200—is within the jurisdiction of the Division Court. Notwithstanding the case of *Vogt v. Boyle*, 8 P. R. 249 (which was decided under a different Statute), the writer has serious doubts of the right to sue on such joint claim in a Division Court. Judicial decision only can settle the question.

It was held in the case of *In re The Merchants Bank v. Van Allen*, 10 P. R. 348, that where a third party was brought into the suit against whom indemnity was sought, and who filed a notice disputing the defendant's claim against him, and the jurisdiction of the Court to try it, and who appeared at the trial and gave evidence and objected to the jurisdiction, that, although judgment could not have been given against him in his absence, owing to the summons not having been served on him, yet, by appearing in the suit, and taking part in the proceedings, both before and at the trial, such third party had waived service of the summons and particulars of demand.

The writer submits, with all due deference to this decision, that by appearing and *objecting* to the jurisdiction, the third party brought in did not waive his rights: *R. v. The Court of Revision of Cornwall*, 25 U. C. R. 286; *Hamlyn v. Betteley*, 6 Q. B. D. 63. At page 65 of the last named report, Lord Selborne, L. C., in speaking of the principle of waiver by appearance, says: "I will first say that I think that the point as to waiver is quite untenable. Even in arbitrations where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the

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whole case, subject to the protest he has made." *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Grant, p. 667.

A Railway Company carries on its business where the general superintendence and management of the business takes place: *Rogers v. L. C. & D. Ry. Co.*, 26 W. R. 192; *Adams v. The G. W. Ry. Co.*, 6 H. & N. 404; *Canada Southern Ry. Co., v. Gebhard*, 109 U. S. 527, Sup. Ct. U. S. A.

A Division Court has jurisdiction to try an action brought upon the judgment of a County Court: *Re Eberts v. Brooke*, 4 C. L. Times 282.

Any appeal from the Judge's decision at the trial, on a question of redistribution of costs, must be made within the time limited for application for new trial, and if any interference with the order is attempted afterwards, prohibition will go: *Bell v. Lamont*, 7 P. R. 307.

Prohibition will not go to restrain proceedings on an attaching order granted on a defective affidavit, that being mere matter of practice: *In re Sato v. Hubbard*, 8 P. R. 445.

A disputed claim for taxes on land, which the defendant was to pay as rent, does not raise the question of title to land, and prohibition was refused: *In re English v. Mulholland*, 9 P. R. 145.

A promissory note was dated at Milton, in the County of Halton, on the 17th of September, 1877, and was made payable at Milton three months after date, with interest at eight per cent. The note was sued in the Division Court at Milton, and the amount claimed on it was \$149.50. The maker died in the County of Essex long after the maturity

of the note; her will was proved in Essex, and the defendants at the time of action resided in that County. It was held that the death of the maker, the circumstances of her making a will appointing the defendants executors, and the proving of the will by the executors, were no part of the cause of action, which was complete before the granting of the probate. That the words "cause of action" must be read with reference to the proving of the contract, and breach between the original parties to the contract. It was also held that the note was properly suable at Milton, under the Division Courts Act of 1880, sections 8, 12: *Re McCallum v. Gracey*, 10 P. R. 514.

In the case of *Gillard v. Chalus*, decided in May, 1885, by the Judge of the County of Wentworth, it was held that an action on three promissory notes, amounting in the whole to between \$100 and \$200, each made payable at the Bank of Montreal, in Hamilton, but none of which being for the sum of \$100, was properly brought in the Court for the Division in which the office of that Bank was situate, under the 8th section of the Division Courts Act of 1880, and that it was not necessary under that section for the exercise of the special jurisdiction there given that some one of the notes sued on should exceed \$100 and not exceed \$200, but that the spirit of the statutory provisions contained in sections 2 and 8 of that Statute was satisfied where the *aggregate* amount of such notes was that sum. In that case it was also held that the plaintiff was entitled to an order for immediate judgment under section 4 of this

Act, because it manifestly appeared, and could not be controverted by evidence, that the Court had jurisdiction, the simple question being *where* the defendant had on the face of the notes made them payable. See note (o) to section 4.

Where the jurisdiction of a Division Court is questioned, it is for the party objecting to the jurisdiction to shew such facts as take from such Court the right to try the case, provided nothing appears on the face of proceedings to oust jurisdiction, and the Judge is not called on to examine or cross-examine witnesses to ascertain jurisdiction: *Friendly v. Needler*, 10 P. R. 267.

Where the amount of a promissory note, sued in the Division Court, and the interest upon it, amounted to more than \$200, it was held that the Judge could not give judgment for any amount beyond that sum: *Re Young v. Morden*, 10 P. R. 276. See *Davidson v. B. & N. H. Ry. Co.*, 5 App. R. 315.

Although a Judge in the Division Court has no power to give judgment against a person who has not been served with a summons, yet, where he appears at the trial without objection he will be taken to have waived the want of service: *In re The Merchants Bank v. Van Allen*, 10 P. R. 348.

Where a party has taken a note for the amount of an account beyond \$100, for goods sold and delivered, he cannot, on dishonor of the note, sue on the account in the County Court and get County Court costs. It is a matter within Division Court jurisdiction. It makes no difference, when the price of goods becomes ascertained by the signature

of the defendant, whether at the time of the original transaction or at any time afterwards, so long as it is before action brought: *White Sewing Machine Co. v. Belfry*, 10 P. R. 64.

Where a person sued in the Division Court on a claim amounting to \$156.36, and unascertained, giving credit for an admitted set-off of \$82.05, it was held that it was for the Judge of the Division Court to determine whether or not it was agreed between the parties that the amount so credited should be allowed in reduction of the plaintiff's claim, and having found that there was such an agreement, it was conclusive: *In re Jenkins v. Miller*, 10 P. R. 95; *Brown v. Cocking*, L. R. 3 Q. B. 672.

2. Section 58 of The Division Courts <sup>43 V. c. 8, s. 58 amend-  
ed.</sup> Act, 1880, is hereby amended by adding thereto the words following:— (e)

“And the Clerk of each Division Court shall, on or before the first day of said month of January, send to the Judge the necessary information in writing for the purposes of such return.”

(e) RETURN TO BE MADE TO JUDGE.

The 58th section of the Division Courts Act of 1880 will, with the amendment here made, now read as follows: “Every Judge of a County Court shall make a return to the Provincial Secretary on or before the fifteenth day of January in every year, shewing the number of judgment debtors who, during the twelve months ending the thirty-first of December previously, were ordered to be committed under each of the five heads mentioned in the one hundred and eighty-second section of the Division Courts Act. [And the Clerk of each Division Court shall, on or before the first day of the said month of January, send to the Judge the necessary information in writing for the purposes of such return.”]

The suggestion which was made at page 90 of Sinclair's D. C. Act, 1880, of the propriety of the Clerks' furnishing the necessary information to the Judge, to enable him to make his return, has apparently not been followed by them, hence the necessity of compelling its performance by this amendment. Very little time is allowed for the giving of the information, but Clerks can in most cases be ready to communicate it to the Judge within the time prescribed. It will be observed that the words are, "*on or before* the first day of said month of January." If the last sittings of any Court for the year have been held, then the Clerk should at once give the information to the Judge; he would then be giving it "before the first day." But should a sittings be held, for instance, on the last day of the year, then he should make the return after such sittings that day or on the following day. It is only necessary for the Clerk to send such information in cases where the judgment debtor has been "*ordered to be committed.*" Where orders by consent or otherwise have been made, merely for payment of the debt or damages and costs, by instalments, or in such other way as the Judge deems just, no notice need be given by the Clerk under this amendment. The information must be communicated to the Judge "in writing," and not verbally. See the notes to the next previous section. As the grounds of committal should appear on the face of the order—Sinclair's D. C. Law, 1884, 292-296—the Clerk will have no difficulty on referring thereto to determine under which of the five heads of section

182 the order was made. The information may be communicated by post, and on the Clerk's depositing the letter containing it in the post office, he would have satisfied the requirements of the Statute: *Dunlop v. Higgins*, 1 H. L. Cas. 381. On the effect generally of mailing notice see *Union F. Ins. Co. v. Fitzsimmons*, 32 C. P. 602; *O'Donohoe v. Wiley*, 43 U. C. R. p. 363; *Frey v. Wellington M. Ins. Co.*, 4 App. R. 293; *Household F. Ins. Co. v. Grant*, 4 Ex. D. 216; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Harris' Case*, L. R. 7 Ch. 587; *Marshall v. Jamieson*, 42 U. C. R. p. 120; *Nasmith v. Manning*, 5 App. R. 126; *McCann v. Waterloo Co. F. Ins. Co.*, 34 U. C. R. 376; *McCrea v. Waterloo Co. M. F. Ins. Co.*, 1 App. R. 218; *Shannon v. Hastings M. F. Ins. Co.*, 26 C. P. 380.

3. Where due proof (*f*) is made by Judgment by default under R. S. O. c. 47, s. 79, where final judgment not entered. affidavit or otherwise of the service (*g*) of a special summons (*h*) issued under section 79 of The Division Courts Act, and of particulars of the plaintiff's claim or demand (*i*) as required by said section, (*j*) and final judgment has not been entered under the provisions of said section, the Judge may, if the defendant does not, in person or by agent, appear (*k*) in open court pursuant to and as required by said summons, give judgment against such defendant by default, without requiring proof of the plaintiff's claim or demand, and with the same consequences and effect (*l*) as if the plaintiff had proved (*m*) his claim or demand in open court.



## (f) PROOF OF SERVICE OF SUMMONS.

This section has evidently been framed to remove the doubt which existed in regard to the amount of proof necessary to entitle a plaintiff to judgment on a special summons where the defendant had entered a notice of dispute but did not appear at the trial: *In re Evans v. Sutton*, 8 P. R. 367, Sinclair's D. C. Law, 1884, p. 116.

The section declares that "due proof" of service of the special summons must be made "by affidavit or otherwise." The expression "due proof" here used must mean the sworn statement, in proper form, of such facts as in law shew that proper service of the summons has been made. Where a person's property may be affected by a proceeding taken in his absence, it is important that all necessary precedent facts should clearly appear.

It is said by an eminent authority that "In law *proof* and *evidence* are constantly used in practice as synonymous, and are sometimes so treated in the books. Properly speaking, however, *evidence* is only the medium of *proof*; *proof* is the effect of *evidence*": Worcester 1140.

Due proof of the service must be made by affidavit or otherwise. Care should be taken in the preparation of the affidavit, and it should be duly taken.

The form of affidavit will be found at pages 323 and 324 of Sinclair's D. C. Act, and the care to be taken in its preparation and taking will be found discussed at pages 97, 101 and 269 of the same work.

The description of the residence of a deponent in an affidavit must be that residence which exists

at the time of the swearing of the affidavit: *Button v. O'Neill*, 4 C. P. D. 354.

The name of the Court and style of cause should appear in the affidavit of service, Rule 133: *Allman v. Kensel*, 3 P. R. 110; *Swift v. Jones*, 6 U. C. L. J. 63; *Hart v. Ruttan*, 23 C. P. 613; *In re Sharpe*, 2 Chan. Cham. 67; *McDonald v. Cleland*, 6 P. R. 289; *Scott v. Mitchell*, 8 P. R. 518; *Robertson v. Coulton*, 9 P. R. 16.

The Judge could, however, receive the affidavit, notwithstanding these defects: Rule 133.

If endorsed on the summons, the style of Court and cause need not be given in an affidavit of service of special summons. Form 107.

The affidavit of service need not contain anything more than the Statutes or Rules of Court require: *Baldwin v. Benjamin*, 16 U. C. R. p. 54.

The heading of an affidavit is merely descriptive and not an allegation of fact: *Hood v. Cronkite*, 4 P. R. 279; *Re Green*, 15 L. J. N. S. 35.

An affidavit of service would be good though it should state the service as made on the day of a certain month, "*instant*," without stating *the year*: *R. v. Tomb*, 4 U. C. R. 177.

The affidavit in any Division Court proceeding can now be taken by a Notary Public: 48 Vict. Chap. 16.

It is doubtful if an affidavit could be taken out of the Province by any of the persons mentioned in the 38th section of chapter 62 of the Revised Statutes of Ontario, except by a Commissioner appointed under the 7th and 8th sections of chapter 63 of the Revised Statutes. It would seem that the

other persons mentioned in chapter 62, section 38, would have authority only to take affidavits to be used in Courts of Record. See also D. C. Act, section 105.

It will be observed that the section declares that due proof of service is to be made "by affidavit *or otherwise*." It is submitted that the words "or otherwise" only mean that the facts may be proved by oral testimony, or other *legal* proof of the fact of service: *Caird v. Fitzell*, 2 P. R. 262; *Davis v. Pearce*, L. R. 5 C. P. 435; but would not justify a Judge in acting on anything less than that.

As remarked by Cotton, L. J., in *Shelford v. Louth and East Coast Ry. Co.*, at page 319 of 4 Ex. D., in construing the same words in the Judicature Act: "The words "or otherwise" mean by any other evidence to which the Court can look."

(g) THE SERVICE.

It need scarcely be said that where the amount of the plaintiff's account, claim or demand, exceeds \$8.00, service of the summons must be personal, but where it does not exceed that sum service may be made on the defendant, his wife or servant, or some grown person, being an inmate of his dwelling house, or usual place of abode, trading or dealing: Sinclair's D. C. Act, 93-95.

Where personal service is not made, it is important that the Bailiff should serve one of the persons mentioned in the 72nd section of the Division Courts Act, and that the fact distinctly appear in the affidavit of service: See Sinclair's D. C. Law, 1884, 232, 235.

The clauses of the Ontario Judicature Act not

being applicable to the Division Courts, except where specially declared to be: *Clarke v. MacDonald*, 4 Ont. R. 310; *Bank of Ottawa v. McLaughlin*, 8 App. R. 543; the provisions therein contained for serving one of several partners of a firm on behalf of the whole have no application to these Courts: See *Pollock v. Campbell*, 1 Ex. D. 50; *Walker v. Rooke*, 6 Q. B. D. 631; *Jackson v. Litchfield*, 8 Q. B. D. 474; *Clark v. Cullen*, 9 Q. B. D. 355; *Adam v. Townend*, 14 Q. B. D. 103; *O'Neil v. Clason*, 46 L. J. Q. B. 191; *Bank of Hamilton v. Blakeslee*, 9 P. R. 130; *Warehouse Co. v. Durrant*, 10 Q. B. D. 471; *Ex parte Young*, 19 Ch. D. 124; *Davis v. Morris*, 10 Q. B. D. 436. These cases shew the nature of proceedings against partners under the Judicature Act, and the rights of parties therein.

Care should be taken that service which is not personal should be on the defendant's wife or servant, or some grown person who is at the time of service "an inmate of the defendant's dwelling house or usual place of abode, trading or dealing." Bouvier defines an "inmate" as "one who dwells in part of another's house, the latter dwelling at the same time in the said house; a fellow-lodger; a fellow-boarder."

The person to be served (in the absence of personal service) should be some one of the three persons mentioned in the section, and if one of the latter two an "inmate" of one of the places mentioned in the section.

A stranger found in the defendant's dwelling house could not be served, and before service the Bailiff should make sufficient inquiry to justify

him in making the service and the affidavit of having done so. Contrast section 203 of the Division Courts Act.

The time of service is regulated by the 70th and 71st sections of the Act. As to what is personal service, and how made, the reader is referred to Sinclair's D. C. Act, 93 *et seq*; *Lambert v. Townsend*, 1 L. J. N. S. Ex. 113; and *Phillips v. Spry*, 1 L. J. N. S. Ex. 115.

As to what is a man's "residence," "dwelling house," "usual place of abode," "trading or dealing," in addition to the authorities cited at pages 86-88, of Sinclair's D. C. Act; D. C. Act, 1880, pages 22 and 34; D. C. Law, 1884, pages 22 and 24, reference may also be made to the following authorities: *Alexander v. Jones*, L. R. 1 Ex. 133; *Ford v. Drew*, 5 C. P. D. 59; *Hanns v. Johnston*, 3 Ont. R. 100, and the notes to section 11 hereto.

It is submitted that strong presumptive evidence of the due service of the summons on the defendant would be the fact of his having given notice of defence under section 79 of the Division Courts Act: *Caird v. Fitzell*, 2 P. R. 262; *Davis v. Pearce*, L. R. 5 C. P. 435. But it would not be evidence of having been served on any particular day anterior to the notice. In fact, the giving notice of dispute would waive any irregularity in the service of summons, or probably the service itself. It is analagous to an appearance in the High Court. "An appearance entered by the defendant waives all irregularities in the process, and even the total want of it": Arch. Pract. 12th Ed. 218.

## (h) SPECIAL SUMMONS.

The section has application only to a special summons issued in pursuance of section 79 of the Division Courts Act: Sinclair's D. C. Act, 99, *et seq.*

The proof must be not only that a special summons has been served, but that the service must have been made of the plaintiff's particulars of demand as well, as required by the 79th section. These particulars must not consist of any claim for unliquidated damages, or anything beyond "*any debt or money demand.*" These are the words of the legislature, and whatever is within their legal signification only comes within the provisions of the section in question.

The writer has, in his first work published on Division Courts, at pages 99 and 100, and at pages 3 and 99 of Sinclair's D. C. Act of 1880, attempted to give a general outline of the cases which would properly be the subject of special summons. Very many cases have been decided since, and many were overlooked. The writer has attempted to collect as many of these cases as possible in this note and in the notes to the next succeeding section.

It may be stated in general terms that all claims which are the subject of garnishment are also the subject of special summons in the Division Court. The writer, of course, only refers to the *nature* of the claim, for in such cases as *Re Mead v. Creary*, 32 C. P. 1, where part of a debt beyond the jurisdiction of the Court was held garnishable, the rule would not hold good, and on the contrary, for

instance, a claim for wages would be the subject of special summons when possibly it would be exempt from garnishment.

Special summons could properly issue on a judgment of a Court of Record in this Province: *Hutchinson v. Gillespie*, 11 Ex. 798; *Re Eberts v. Brooke*, 4 C. L. Times 282; or on a judgment of such a Court in any other Province: *Henderson v. Henderson*, 6 Q. B. 288; or on a foreign judgment: *Grant v. Easton*, 13 Q. B. D. 302.

Nothing but a payment made by compulsion of law would be any answer by a garnishee in an action on a special summons against him by his original creditor: *Mayor of London v. London Joint Stock Bank*, 6 App. Cas. 393; *Sykes v. Brockville and Ottawa Ry. Co.* 22 U. C. R. 459; *Wardrope v. Can. P. Ry. Co.*, 20 L. J. N. S. 133; *In re Smart v. Miller*, 3 P. R. p. 393.

It is questionable if money due under the provisions of a will would be the subject of special summons: *Soules v. Soules*, 35 U. C. R. 334.

In *Bank of Hamilton v. The Western Ins. Co.*, 38 U. C. R. 609, it was held that money payable under a fire insurance policy was "a purely money demand" under the Act of 36 Vict., chap. 8, s. 2 (Ont.) But see *Boyd v. Haynes*, 5 P. R. 15.

In *Cole v. The Bank of Montreal*, 39 U. C. R. 54, it was held that where the assignors of a judgment had received part payment of the moneys due on such judgment before assignment, and had in the deed of assignment covenanted that they had not received the same, the claim for repayment of such moneys was "a purely money demand" under the Statute last quoted.

An action for breach of covenant for title was held not to be for "a purely money demand" under that Statute: *Kavanagh v. The Corporation of the City of Kingston*, 39 U. C. R. 415; but in *Kelly v. The Isolated Risk and Farmers' F. Ins. Co.*, 26 C. P. 299, a claim on an *interim* fire insurance receipt was held to be so.

It was doubted in the case of *Green v. The Hamilton Provident Loan Co.*, 31 C. P. 574, whether the claim of a second mortgagee for the surplus proceeds of a sale by the first mortgagee, after satisfaction of the mortgage of the latter, was "a purely money demand."

It is doubtful if an unascertained balance, claimed to be due by one partner to another at the time of dissolution, and which would require the taking of accounts between them to ascertain it, would be the subject of special summons: *Hall v. Lannin*, 30 C. P. 204. It is submitted it would not be: *Hope v. Ferris*, 30 C. P. 520; but interest on a promissory note or bill of exchange accrued after maturity would be: *McCracken v. Creswick*, 8 P. R. 501; *In re Widmeyer v. McMahon*, 32 C. P. 187; *Southampton Dock Co. v. Richards*, 1 M. & G. 448.

It is submitted that *Davidson v. Cameron*, 8 P. R. 61, in which the Master in Chambers held that a foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O., chap. 50, section 153, cannot now be considered law, in view of the later case in the Court of Appeal in England of *Grant v. Easton*, 13 Q. B. D. 302.

Goods sold and delivered would clearly be the subject of special summons: *Watson v. Severn*,  
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6 App. R. 559; *Durnin v. McLean*, 20 L. J. N. S. 290, 10 P. R. 295; *Smith v. Wilson*, 4 C. P. D. 392, 5 C. P. D. 25; *McNaughton v. Webster*, 6 U. C. L. J. 17; *Wallbridge v. Brown*, 18 U. C. R. 158.

It is submitted in view of the later cases, that *McKinstry v. Arnold*, 4 U. C. L. J. 68, cannot now be considered authority.

In *Sinclair v. Chisholm*, 5 P. R. 270, it was held that notarial fees on a bill dishonored for non-acceptance were not the subject of special endorsement in the absence of an agreement to accept, but that such fees on a promissory note would be is authorized by *Burns v. Rogers*, 17 L. J. N. S. 209.

A promissory note made in the United States, payable in American currency, would be the subject of special endorsement: *Third National Bank of Chicago v. Cosby*, 43 U. C. R. 58. See *Cushman v. Reid*, 20 C. P. 147. So also would a share or contribution to the payment of certain bills of exchange and promissory notes on which the plaintiff and defendant might have been jointly liable: *Walker v. Hicks*, 3 Q. B. D. 8.

Debts of an equitable as well as of a legal nature are the subject of special summons: D. C. Act, section 54, sub-section 2; *Wilson v. Dundas*, W. N. 1875, 232; *In re Cowans' Estate*, *Rapier v. Wright*, 14 Ch. D. 638; *Leaming v. Woon*, 7 App. R. 42.

It is submitted that, generally speaking, where a claim would be the subject of special endorsement under Rule 14 of the Judicature Act, or the subject of immediate judgment under Rule 80 of that Act, it would be the subject of special summons under section 79 of the Division Courts Act

and this section, but more specific particulars are required in the Division Court than under the Judicature Act: *Sinclair's D. C. Act*, 239 (e); *Smith v. Wilson*, 4 C. P. D. 392, 5 C. P. D. 25; *Godden v. Corsten*, 5 C. P. D. 17.

A claim for interest should either expressly or impliedly shew the amount and the period from which it is claimed: *Bardell v. Miller*, 7 C. B. 753.

There could not be a special summons where something beyond the recovery of money is sought: *Fell v. Williams*, 3 C. L. Times, 358; *Standard Bank v. Wells*, 20 L. J. N. S. 71; nor in an action for the price of land before conveyance made: *Hood v. Martin*, 9 P. R. 313.

But if the summons should be issued for a proper claim, and also one improperly joined, the latter could on application be struck out: *Robinson v. Ralston*, L. R. 8 Irish 26.

Counsel fees could under the law of this Province be the subject of special summons: *McDougall v. Campbell*, 41 U. C. R. 332; *Re C. K. & C.*, 6 P. R. 226; *R. v. Doutre*, 6 Sup. R. 342; but the fees of an arbitrator where no award was made could not be: *The Corporation of Brockton v. Denison*, 20 L. J. N. S. 86.

An action against a Division Court Clerk or Bailiff for suitor's money in his hands would be the subject of special summons: *McLeish v. Howard*, 3 App. R. 503; *Dolphin v. Layton*, 4 C. P. D. 130; *Bland v. Andrews*, 45 U. C. R. 431.

Where an original demand beyond the jurisdiction of the Court is ascertained by the signature of the party liable, and a balance not exceeding \$200

remains due, the latter is the subject of special summons from the Division Court: *Bank of Ottawa v. McLaughlin*, 8 App. R. 543.

The Clerk should enter judgment on a special summons without production of the security on which the action is brought: *In re Drinkwater v. Clarridge*, 8 P. R. 504.

A debt not due could not be sued for: *Sinclair's D. C. Law*, 1884, 138; *Kyle v. Barnes*, 10 P. R. 20.

The summons should shew the names of plaintiff and defendant in full, Rule 3, and as the provisions of the Judicature Act in regard to suing parties in their partnership name do not apply to Division Courts, the names of *all* partners should be given as parties: *Clarke v. Macdonald*, 4 Ont. R. 310; *Bank of Ottawa v. McLaughlin*, 8 App. R. 543.

A claim for damages for breach of covenant in a lease would not be the subject of special summons: *Gowanlock v. Mans*, 9 P. R. 270; see also *Standard Bank v. Wells*, 20 L. J. N. S. 71.

The issue of a writ of summons is not a judicial act, and the Court may inquire what period of the day it issued, whether before or after the cause of action arose: *Clarke v. Bradlaugh*, 8 Q. B. D. 63; see *Sinclair v. Robson*, 16 U. C. R. 211; *Edgar v. Magee*, 1 Ont. R. 287; *Reed v. Smith*, 19 L. J. N. S. 12; *Whitwell v. Brigham*, 19 Pick. 117.

(i) PARTICULARS OF CLAIM OR DEMAND.

It will be observed that particulars of the plaintiff's claim or demand, as required by the 79th section of The Division Courts Act, must be served with the summons. That section requires that the particulars of plaintiff's claim "with reasonable

certainty and detail" must be "endorsed on or attached to the summons," and that a copy of the summons and particulars, with a notice in the form prescribed by the general Rules or Orders relating to Division Courts, from time to time in force—Sinclair's D. C. Act, 290—shall be duly served on the defendant before any judgment against him can be obtained.

The 79th section must be read in connection with Rules 3, 4, 12 and 15 of the Division Court Rules: Sinclair's D. C. Act, 239-241. The remarks which are made in the next preceding note, as to the necessity of giving the individual names of partners in the summons in suits by or against them, has equal application to particulars of claim or demand. As to forms of particulars see Sinclair's D. C. Act, 287.

The 79th section of the Division Courts Act, and Rules 3 and 4, require a much fuller statement of the particulars of claim than is required under the special endorsement clauses of the Judicature Act: Sinclair's D. C. Act, 239 (e); *Smith v. Wilson*, 4 C. P. D. 392, 5 C. P. D. 25; *Godden v. Corsten*, 5 C. P. D. 17.

(j) ACCOUNT STATED.

Frequently claims are entered as "To balance of account rendered." This is not a compliance with the Statute or Rules of Court, and it is submitted that a Judge should not give judgment under this section on such particulars: *Wilkes v. Buffalo B. & G. Ry. Co.* 2 U. C. L. J. 230; see *Smart v. N. & D. R. Ry. Co.*, 12 C. P. 404.

The rendering of an account simply in ordinary

transactions, not between merchant and merchant, and unreplied to, does not constitute evidence of a complete admission of a debt. Taken in connection with other circumstances it may be some evidence of it, but is not of itself sufficient. If the plaintiff desires to maintain his action in the Division Court on an account stated, his particulars should distinctly shew that contention, and if he cannot prove an account stated, he would, unless allowed to amend, fail in his action. An adjournment of the case upon terms would be granted almost as a matter of course, with the view of the plaintiff's amending his particulars of claim: *Sinclair's D. C. Act, 106, 107 and 240, Rule 4.*

As *the account stated* is a very common form of claim in Division Courts, a few remarks concerning it may not be inopportune. It is an admission of a sum of money being due from the defendant to the plaintiff, and may be charged as a distinct cause of action: 2 Wms. Saunders, 122 c.; *Irving v. Veitch*, 3 M. & W. 90, 106. It lies upon an absolute acknowledgment made by the defendant to the plaintiff of a debt due from him to the plaintiff, and payable at the time of action brought: *Wayman v. Hilliard*, 7 Bing. 101; *Knowles v. Michel*, 13 East 249; *Highmore v. Primrose*, 5 M. & S. 65; *Gough v. Findon*, 7 Ex. 48; *Lemere v. Elliott*, 6 H. & N. 656; *Hill v. Lott*, 13 U. C. R. 465.

An account stated alone does not extinguish, supersede or alter the previous debt respecting which it was stated; *Toms v. Sills*, 29 U. C. R. 497; *Haris v. Chapman*, 17 L. T. N. S. 517; *Fidgett v.*

*Penny*, 1 C. M. & R. 108; *Smith v. Page*, 15 M. & W. 683; *Perry v. Attwood*, 6 E. & B. 691.

An account stated respecting debts on both sides may, by agreement between the parties, operate as a complete extinction of the cross demands, and so operate as payment *pro tanto*: *Ashby v. James*, 11 M. & W. 542; *Callander v. Howard*, 10 C. B. 290.

An account stated alone is not conclusive between the parties, but the debts respecting which it was stated may be examined to ascertain if any mistake has occurred: *Trueman v. Hurst*, 1 T. R. 40, 42; *Thomas v. Hawkes*, 8 M. & W. 140; *Perry v. Attwood*, 6 E. & B. 691; *Toms v. Sills*, 29 U. C. R. 497. For instance, if an action were brought on an I. O. U. given for a prospective debt, that fact could be shewn to defeat the action: *Lemere v. Elliott*, 6 H. & N. 656; or if stated respecting a debt without consideration, or upon a consideration that has failed: *Jacobs v. Fisher*, 1 C. B. 178; *Wilson v. Wilson*, 14 C. B. 616; or that the debt was upon an illegal consideration, or for an illegal purpose: *Rose v. Savory*, 2 Bing. N. C. 145.

But the account could be stated for money borrowed to pay a gambling debt, or for money paid by an agent who had been employed to make a bet and had lost: *Read v. Anderson*, 13 Q. B. D. 779; *Bubb v. Yelverton*, L. R. 9 Eq. 471; *Beeston v. Beeston*, 1 Ex. D. 13; *Ex parte Pyke*, *In re Lister*, 8 Ch. D. 754.

It is no defence that the account was stated respecting a debt due under a contract within the Statute of Frauds of which there was no memoran-

dum in writing: *Cocking v. Ward*, 1 C. B. 858; also see *Sparling v. Savage*, 25 U. C. R. 259.

The acknowledgment may be proved by writing, as by a bill of exchange or promissory note: *Wheatley v. Williams*, 1 M. & W. 533; either of which would be evidence of an account stated between the *immediate* parties to it, but not between remote parties: *Burmester v. Hogarth*, 11 M. & W. 97.

An I. O. U. is evidence of an account stated with the person to whom it is addressed: *Jacobs v. Fisher*, 1 C. B. 178; *Wilson v. Wilson*, 14 C. B. 616; and if it bears no address, then with the holder in the absence of evidence to the contrary: *Curtis v. Rickards*, 1 M. & G. 46; *Fesenmayer v. Adcock*, 16 M. & W. 449; *Buck v. Hurst*, L. R. 1 C. P. 297.

The acknowledgment must shew either expressly or by sufficient reference that a sum certain is due and must be paid either to the plaintiff or to his agent: *Hughes v. Thorpe*, 5 M. & W. 656; *Kirton v. Wood*, 1 M. & Rob. 253; *Lane v. Hill*, 18 Q. B. 252; *Bloomley v. Grinton*, 1 C. P. 309.

It is not sufficient if made to a stranger: *Breckon v. Smith*, 1 A. & E. 488; *Tucker v. Barrow*, 7 B. & C. 623; and it must be made by the defendant or his agent.

An arbitrator is not the agent of either party, so as to render his award evidence of an account stated: *Bates v. Townley*, 2 Ex. 152; *Ruthven v. Ruthven*, 8 U. C. R. 12.

An acknowledgment of a debt payable at a future time is evidence of an account stated, upon which a right of action would commence when the

time of payment had arrived, as a promissory note or bill of exchange, or other document, payable at some period after date: *Wheatley v. Williams*, 1 M. & W. 533; *Russell v. Wells*, 5 O. S. 725; *Fryer v. Roe*, 12 C. B. 437; so also a note payable by instalments: *Irving v. Veitch*, 3 M. & W. 90; *McQueen v. McQueen*, 9 U. C. R. 536. As to an acknowledgment of a debt payable upon a contingency, see *Baker v. Heard*, 5 Ex. 959.

An acknowledgment by deed would not, it is said, be evidence of an account stated: *Middleditch v. Ellis*, 2 Ex. 623; but see *Tilson v. Warwick Gas Co.*, 4 B. & C. 962.

A subsequent account stated respecting the same matter is not of itself a defence to an action on a previous one: *Fidgett v. Penny*, 1 C. M. & R. 108.

In an action against the joint makers of a note, one having signed as surety for the other, the note is *prima facie* evidence only of an account stated which the surety may rebut by shewing the facts: *Hogan v. McSherry*, 6 O. S. 633; but see *Hogan v. Malone*, H. T. 7 Vict.

A promissory note given to an agent upon a settlement of accounts is evidence of an account stated with his principal when the fact of agency was known to the other party: *Rhodes v. Executors of Crawford* 1 U. C. R. 257. An instrument was in these words: "Ten days after date we promise to pay N. Newhorn the sum of £83 15, for value received," upon which was endorsed at the time the note was given the following memorandum: "It is agreed that this note is to be paid by a lawful mortgage, with interest on the same, having three



years to run." It was held that it could not be sued on as a note, or given in evidence on the account stated: *Newhorn v. Lawrence*, 5 U. C. R. 359.

The following document was held evidence of an account stated: "Three months after date, we, or either of us, promise to pay to Elias S. Reed (the plaintiff), or John Fraser, his guardian, at the Post Office, Embro, £110 17, Cy., value received in rent of farm," though not a promissory note: *Reed v. Reed*, 11 U. C. R. 26.

A claim upon an account stated cannot be supported by a note which was not due when the action was commenced: *Hill v. Lott*, 13 U. C. R. 465.

At the trial the plaintiff produced a draft by himself on the defendant, in which were the words, "being the balance in full of your account," and proved that when presented the defendant acknowledged the amount to be correct, but would not accept it as he was afraid he would be sued, was held evidence of the account stated: *McMurtry v. Munro*, 14 U. C. R. 166.

An instrument in this form was held evidence of an account stated: "\$300—Good to T. T. to the amount of \$300, to be paid to him or his order, at E. C's. mill, in the Township of Elma, in the County of Perth, in lumber at cash price": *Tyke v. Cosford*, 14 C. P. 64.

An instrument dated at New York, signed and endorsed by defendant, promising to pay "to the order of myself," \$1040.23 at the Bank of Upper Canada in Toronto, "with the current rate of exchange on New York," though not a promissory

note was held evidence of the account stated: *Grant v. Young*, 23 U. C. R. 387; *Wood v. Young*, 14 C. P. 250.

The defendant signed a note or instrument agreeing to pay five per cent. a month, held that the amount agreed upon was recoverable under the common count for interest and account stated: *Young v. Fluke*, 15 C. P. 360.

During the existence of the Stamp Act it was held that an unstamped note was not evidence of an account stated: *Stephens v. Berry*, 15 C. P. 548; but the existence of unstamped renewals of a note given before the Stamp Act did not prevent the latter being given in evidence in support of the account stated: *Ritchie v. Prout*, 16 C. P. 426.

It was held that an instrument in this form, "Good to Mr. Palmer for \$850 on demand," was not a promissory note, but evidence of an account stated: *Palmer v. McLennan*, 22 C. P. 258, 565.

A plaintiff may recover on the account stated on an express promise to pay a specified sum, part of an account: *Crooks v. Law*, 5 O. S. 306.

An account stated by an executor, of a debt due by his testator, never before ascertained or determined, was held sufficient to charge the executor as a substantive debt without any express promise to pay: *Watkins v. Washburn*, 2 U. C. R. 291.

A casual observation will not support the account stated: *Curtis v. Flindall*, 3 U. C. R. 323.

Where A, as part consideration for the purchase of certain timber from B, promised C to pay B's debt to him of £20, and paid £10 to C, and was to pay the remaining £10 next morning, it was held

that C could recover the £10 from A on account stated: *Fergusson v. Kerr*, 5 U. C. R. 261.

An admission made casually to a stranger, and not to the plaintiff or an agent of his, is not in itself sufficient to sustain an action on the account stated: *Green v. Burtch*, 1 C. P. 313.

A statement made out by the defendant's book-keeper at the plaintiff's request was held insufficient to support the account stated: *Zimmerman v. Woodruff*, 17 U. C. R. 584.

The mere calculation of what is due on a former transaction will not support the account stated: *McKay v. Grinley*, 30 U. C. R. 54.

A stating and settlement of accounts may be pleaded to an action for matters taken into such account: *Melville v. Carpenter*, 11 U. C. R. 132; *Beattie v. Hatch*, 12 U. C. R. 195.

An offer to pay a sum less than the sum claimed, if unaccepted, is not any evidence of an account stated in an action for the larger sum: *Atkinson v. Woodhall*, 1 H. & C. 170.

An admission by the defendant of a debt due to a solicitor for his services as such, will not enable the solicitor to recover on an account stated, so as to defeat the provisions of the Statute requiring a signed bill to be delivered by the solicitor before action: *Brooks v. Bockett*, 9 Q. B. 847; *Scadding v. Eyles*, 9 Q. B. 358.

A defendant who has admitted that he owes a certain sum of money to the plaintiff, and has recognized the title of the latter to the money, cannot of his own accord set up the right of a third

party for the purpose of defeating the plaintiff's claim : *Peacock v. Harris*, 10 East 107.

Where two parties meet and settle their accounts, such settlement will not be set aside or re-opened on the ground of the existence of inconsistent charges or overcharges, or on the ground of some mistake as to legal rights, or on the ground that some of the claims or demands were those for which no action could be maintained, or were only equitable moral claims : *Dawson v. Remnant*, 6 Esp. 24 ; *Laycock v. Pickles*, 4 B. & S. 497.

But a party who has admitted the correctness of an account is not conclusively bound by it : *Shand v. Grant*, 15 C. B. N. S. 324. He may shew that the admission was made under a mistake : *Thomas v. Hawkes*, 8 M. & W. 140 ; or that certain items were miscalculated or founded in error : *Rose v. Savory*, 2 Bing. N. C. 145 ; *Cox v. Prentice*, 3 M. & S. 344. But he must do so promptly and before the other party has innocently acted upon the faith of the correctness of the account and altered his previous position so as to render it inequitable to call upon him to refund the money : Addison on Contracts, 7 Ed. 1073.

For reference to the other causes of action which would be the subject of claim on special summons under the 79th section of the Division Courts Act, see Sinclair's D. C. Act, 63-69.

The particulars of claim or demand must be delivered to the Clerk with the necessary copy or copies for service : *Ib* 90.

Where the summons is issued from a Court whose place of sitting is the nearest to the residence

of the defendant under section 63 it must contain the statement mentioned in Rule 5.

It will be observed that the latter part of section 82 of the Division Courts Act requires *personal* service of the summons and of "*detailed* particulars of the plaintiff's claim," but the 79th section of that Act and this section only require ordinary service of the summons, with particulars of the plaintiff's claim "*with reasonable certainty and detail.*"

A summons issued on a claim not exceeding \$8, and where service was made under the last alternative of section 72, would come within the provisions of this section. Whatever may have been the meaning of the concluding part of section 82 of the Division Courts Act, it appears to the writer that its operation will be almost entirely superseded by this provision.

(k) IF DEFENDANT DOES NOT APPEAR.

It will be observed that the defendant must appear "*in open Court,*" pursuant to the special summons, either "in person or by agent," if he wants to prevent judgment being given against him by default under this section.

The expression here, "*in open Court,*" is evidently intended to mean a *visible* appearance of the defendant in Court, personally or by agent, and not the technical appearance which a notice of dispute has been thought to imply.

Any person may appear at the trial and act as the agent and advocate for the defendant: Sinclair's D. C. Act, 107.

The authority of the agent would generally cease

with the judgment: *Lovegrove v. White*, L. R. 6 C. P. 440, 444; Rob. & J's. Digest, 313.

The appearance must be at the proper sitting, and should the hearing of the case for any cause be adjourned, the Judge would have the same power at the adjourned hearing as he had originally, and if the defendant should appear at the first sitting and not appear at the adjournment, nevertheless judgment could on the latter day be given against him by default.

The "default" here mentioned is the absence of the defendant or his agent from "open Court," and of there being no opposition to the plaintiff's claim.

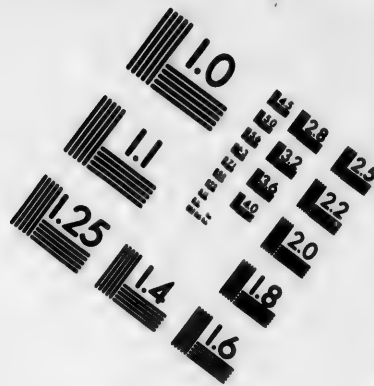
In the event of such default of appearance, the Judge "*may*," without requiring proof of the plaintiff's claim or demand, give judgment against the defendant. Ordinarily, the word "*may*," when applied to the duties of judicial officers, is construed as imperative—as giving a *power* and not merely a *discretion*, which power must be exercised upon proof of the facts calling for its exercise: Sinclair's D. C. Law, 1884, 66; *R. v. Boteler*, 4 B. & S. 959; *Aitcheson v. Mann*, 9 P. R. 473. Whether that rule of statutory construction could be invoked here admits of doubt. There might be good reason for a Judge refusing to give judgment for the amount of a claim, even in the absence of the defendant or of any one on his behalf. In cases beyond the jurisdiction of the Court, or which on the ground of public policy the Statute has declared, as in the 53rd section of the Division Courts Act, that the Division Court shall not have jurisdiction, it would not only be the province but the duty of the Judge,

it is submitted, to refuse the plaintiff judgment by default, under this section. But in other cases the same may also be said. A claim for extortionate interest, or otherwise of doubtful character, should not be the subject of judgment by default, if the Judge questioned its correctness or had doubts of its honesty. In such cases could he refuse judgment by default and call for proof of the claim? We think he could. The common rule of law, well understood, is that if a defendant's pleading necessitates the plaintiff's proof of any fact necessary for his recovery in the case, then such proof must be given. It is only by Statute that such proof can be dispensed with, which this section assumes to do. It is therefore only an exception to the ordinary rule of law, and being so, the Judge would have the right to inquire into the circumstances, so as to determine whether or not the rule or the exception should be applied. It does not take away the right of the Judge to require proof of the claim, should justice in his opinion demand it, but the section empowers him to *dispense* with that proof when satisfied with the justice of the plaintiff's claim. It is submitted that the rule for a Judge to observe in acting under this section is not to incline to a laxity of practice in giving judgment by default on the one hand, nor on the other hand arbitrarily to require proof of the claim by the plaintiff, but to meet out justice by not unnecessarily inconveniencing a plaintiff by requiring proof, nor do injustice to the defendant by a too hasty examination of the claim for which he is sued. Much must depend in every case on the nature of the claim.

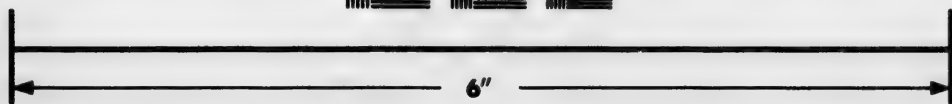
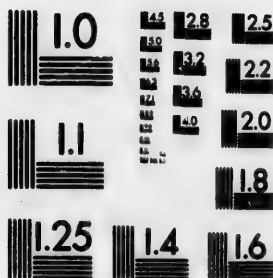
Should a defendant give notice disputing the plaintiff's claim, and not appear at the trial, the plaintiff, though not called upon to prove his case, would be entitled to tax against the defendant, if costs allowed him, the necessary costs and expenses of preparing for the trial of the cause. The cost of subpœna, or summons to witnesses, and service thereof, witness fees, his own expenses as a witness when taxable--Sinclair's D. C. Act, 327; *Fox v. Toronto and Nipissing Ry. Co.*, 7 P. R. 157—and other necessary and taxable costs or expenses, even of a commission, should be taxed to the plaintiff if costs are awarded him by the judgment. The principle on which a party's own expenses are allowed by way of witness fees is stated by Morrison, J., in the case last cited. He says, "The principle upon which all such costs are allowed is as stated by Lord Campbell, C. J., in *Howes v. Barber*, 18 Q. B. 588, that "the reasonable expenses to which the plaintiff is put by being obliged to attend and be examined as a witness to enforce payment of a just demand, or to seek redress for an injury, should be thrown on the wrong-doer." As to the affidavit which must be made by a party to entitle him to his own witness fees against his opponent, see Sinclair's D. C. Act, 328.

After the defendant has put in a defence, though merely for time, it would not lie in his mouth to say that the plaintiff should not have prepared for trial, or believed that the defendant was only trifling with the Court. He must take the ordinary consequences of his own act. He at least cannot question the *bona fides* of his own conduct: *Browne*





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v. *Smith*, 1 P. R. 347; R. & J's Digest, 2917; *Middleton v. Pollock*, 4 Ch. D. 49.

From the nature of proceedings in cases of attachment against absconding debtors, and considering the right of other creditors to intervene under Rule 36, it is submitted that this section would not apply to such cases. See *Offay v. Offay*, 26 U. C. R. 363.

(D) CONSEQUENCES AND EFFECT OF JUDGMENT.

The consequences and effect of the judgment are declared to be the same as if the plaintiff "had proved his claim or demand in open Court." In other words, whatever rights the plaintiff would have on a judgment recovered in a contested case, the same are assured to him on a judgment by default under this section. As to the effect generally of judgments in the Division Court and the subsequent proceedings that may be taken thereon, see Sinclair's D. C. Act, 5, 6, 172, 173, 189.

The usual consequence of a Division Court judgment is the right of a plaintiff to have execution issued against the goods and chattels of the defendant, and such goods and chattels levied upon by the Bailiff, and in default of sufficient goods or chattels, the proceeding against lands allowed to be taken under the 165th and four following sections of the D. C. Act, and the proceeding by judgment summons authorized by the 177th to 189th sections.

It appears to the writer that the last part of this section is superfluous. The section only relates to a matter of proof. On the plaintiff's obtaining judgment, and default being made in the payment

of it, he would, under the 156th section of the Division Courts Act, have the right to issue execution, and under other sections of the Act take other proceedings as fully as if the words "with the same consequences and effect" had been omitted. However, they place the right beyond question. The right to move against the judgment on any ground open to a defendant in contested cases would equally be open to him here.

(m) RIGHTS AND LIABILITIES OF MARRIED WOMEN.

This seems an appropriate place to take a short view of the Statute lately passed relative to the rights of property of married women, to state very briefly the conclusions which decided cases had established under the law as it formerly stood, and to shew what general propositions are deducible from the present Act of 47 Victoria, chapter 19 (Ontario). More particularly does this appear not only opportune, but necessary, when we consider how frequently the rights and liabilities of married women come up for discussion and adjudication in the Division Courts.

The Married Women's Property Act, 1884, like its predecessors, was not intended to give, nor does it give, the same remedies against a married woman that the law affords against her husband. It is intended to allow a married woman to contract as a *feme sole* with reference to her separate property, and to render her present or future separate property liable for her contracts and torts, and to preserve to her all such property in whatever form as exclusively her own.

Another object was to afford the means of

reaching her separate property, not only for her contracts, but her torts as well. Under the law in force before the first of July, 1884, the test of a married woman's capacity to contract was her being possessed of property, real or personal, at the time of the contract. The law subjected that and that only to the liability of such contract. But the late Statute now shifts the onus from the party contracting with a married woman to herself, and declares that in all contracts entered into by her it will be presumed that she so entered into them with reference to her then or subsequently acquired property. It must, however, appear that a married woman means to contract on her own behalf, and not on behalf of her husband or anybody else. Necessaries got by her, for instance, for the purposes of the household, would be presumed to have been so got on the credit of her husband, and not with reference to her own separate property, unless the contrary were distinctly shewn: *Debenham v. Mellon*, 6 App. Cas. 24. But a married woman could contract for herself and as the agent for her husband jointly with herself as well: *Young v. Schuler*, 11 Q. B. D. 651.

Her rights and remedies for the protection and security of her property, even against her husband, are assured to her under the Act. Her ante-nuptial contracts can be enforced, and her separate property rendered liable for them in a manner unknown to the common law. A married woman may be an executrix or administratrix, either alone or jointly with any other person. She may, under certain circumstances, obtain protection for the earnings

of her minor children, and she may devise by her will whatever separate property, real or personal, she may possess, to whomsoever she may think proper, as freely as if she were unmarried. In fact this Statute confers rights and remedies on married women in respect to their property far beyond any law hitherto in force. In the following pages a faint glance will be taken at some of the provisions of this Act, to shew a few propositions of law deducible from it, and more especially those having reference to Division Court practice. The general subject is too extensive to do more.

Our Act very closely follows the Married Women's Act, 1882, of England, so that we have the advantage of many decisions in the mother country which will be found invaluable authority in the construction of our Statute: *Trimble v. Hill*, 5 App. Cas. 342. The following are a few :

#### GENERAL PROPOSITIONS.

1. Every contract entered into since the first day of July, 1884, by a married woman, with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of and entitled to at the date of the contract, but also all separate property which she may thereafter acquire: The Married Women's Property Act, 1884, section 2, sub-section (4). But as respects contracts entered into *before* the 1st of July, 1884, property acquired after the date of the contract cannot be made chargeable therewith: *Conolan v. Leyland*, 27 Ch. D. 632; *King v. Lucas*, 23 Ch. D. 712.

*Contra*, see *In re Widmeyer v. McMahon*, 32 C. P. 187, and *Berry v. Zeiss*, 32 C. P. 231.

2. Every contract entered into by a married woman since the first day of July, 1884, shall be deemed to be a contract entered into by her with respect to and to bind her separate estate unless the contrary be shewn: The Married Women's Property Act, 1884, section 2, sub-section (3); Griffith on Married Women's Property, 5th Ed., pages 31, 36; Thicknesse on the same subject, 22, 30, and 60 to 62.

3. A married woman can be sued for tort committed by her during marriage as if she were a *feme sole*: The Married Women's Property Act, 1884, section 2, sub-section (2); Griffith on Married Women's Property, 5th Ed. 28; *Stone v. Knapp*, 29 C. P. 605. But the Statute does not appear to extend this liability in such cases to subsequently acquired property: Lennard on Married Women, 19.

4. In addition to the liability of the wife's property for her torts, her husband is also personally liable therefor to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him and any sums for which judgment may have been *bona fide* recovered against him in any proceeding at law in respect of her wrongs, for in respect to which his wife is liable: The Married Women's Property Act, 1884, section 13; Thicknesse on Married Women's Property, 59, 106, 114; *De Greuchy v. Wills*, 4 C. P. D. 362;

*Matthews v. Whittle*, 13 Ch. D. 811; *Fear v. Castle*, 8 Q. B. D. 380.

5. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into by her before marriage, to the same extent and subject to the same exception as mentioned in the next preceding proposition: The Married Women's Property Act, 1884, section 13; Thicknesse on Married Women's Property, 106, 114.

6. A married women cannot contract so as to give a personal remedy against her, the remedy is against her separate property and that alone: *Francis v. Wigzel*, 1 Madd. 262; *Hulme v. Tenant*, 1 Brown C. C. 16, 21; *Aylett v. Ashton*, 1 My. & Cr. 105; *Atwood v. Chichester*, 3 Q. B. D. 722; *Ex parte Jones*, 12 Ch. D. 484; *Durrant v. Ricketts*, 8 Q. B. D. 177; *Davis v. Ballenden*, W. N. 1882, 92; *Barber v. Gregson*, 43 L. T. N. S. 428; *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Ortner v. Fitzgibbon*, 43 L. T. N. S. 60; *Macqueen v. Turner*, 30 W. R. 80; *Davies v. Jenkins*, 6 Ch. D. 728; *Flower v. Buller*, 15 Ch. D. 665; *Lawson v. Laidlaw*, 3 App. R. 77; *Perks v. Mylrea*, W. N. 1884, 64; *Standard Bank v. Boulton*, 3 App. R. 93; *Field v. McArthur*, 27 C. P. 15; *Clarke v. Creighton*, 45 U. C. R. 514; *Griffin v. Patterson*, 45 U. C. R. 536; *Collett v. Dickenson*, 4 Ex. D. 285, 11 Ch. D. 687; *Denham v. Brewster*, 28 C. P. 607; *Murray v. McCallum*, 8 App. R. 277; *McLean v. Smith*, 10 P. R. 145; *G— v. R—*, 9 P. R. 174; *Bell v. Riddell*, 2 Ont. R. 25, 10 App. R. 544; *Wallace v. Hutchison*, 3 Ont. R. 398; *Horner v. Kerr*, 6 App. R. 30; *Barker v. Westover*, 5 Ont. R. 116; *Furness v.*



*Mitchell*, 3 App. R. p. 527; *Darling v. Rice*, 1 App. R. 43; *Quebec Bank v. Radford*, 21 L. J. N. S. 162; *Cameron v. Rutherford*, 21 L. J. N. S. 162; *Kinnear v. Blue*, 10 P. R. 465. *Contra—Berry v. Zeiss*, 32 C. P. 231; *In re Widmeyer v. McMahon*, 32 C. P. 187, and the dissenting opinion of Armour, J., in *Clarke v. Creighton*, 45 U. C. R. 514.

7. With respect to the separate estate of a married woman free from restraint upon anticipation, she is competent to contract with her own husband: *Hewison v. Negus*, 16 Beav. 594, 598; *Vansittart v. Vansittart*, 4 K. & J. 62, 70; *Woodward v. Woodward*, 3 De G. J. & S. 672; *Butler v. Butler*, 14 Q. B. D. 831, 834.

8. In an action against a married woman on a contract made before the first day of July, 1884, it must still be shewn that at the time of the contract she had property with reference to which she did contract: *Warne v. Routledge*, L. R. 18 Eq. 497; *Barber v. Gregson*, 43 L. T. N. S. 428; *Robinson v. Pickering*, 16 Ch. D. 660; *McCready v. Higgins*, 24 C. P. 233; *Conolan v. Leyland*, 27 Ch. D. 632; *King v. Lucas*, 23 Ch. D. 712. But having separate property, and having entered into the contract, it would be presumed that she did contract with reference to such property: *Johnson v. Gallagher*, 3 De G. F. & J. 494; *Butler v. Cumpston*, L. R. 7 Eq. 16; *Mrs. Matthewman's Case*, L. R. 3 Eq. 781; *Hartford v. Power*, 3 Irish Eq. 608; *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Field v. McArthur*, 25 C. P. 167; *Darling v. Rice*, 1 App. R. p. 45; *London Chartered Bank v. Lempriere*, L. R. 4 P. C. 593, 594;

*Wainford v. Heyl*, L. R. 20 Eq. p. 324; *Skinner v. Todd*, 46 L. T. N. S. 131.

9. That as to causes of action which accrued before the first day of July, 1884, and since that date, a married woman can be sued alone on all contracts made by her with reference to her separate property: *Clarke v. Creighton*, 45 U. C. R. 514; *Merrick v. Sherwood*, 22 C. P. 467; *Steels v. Hullman*, 33 U. C. R. 471; *McFarlane v. Murphy*, 21 Grant 80; *Boustead v. Whitmore*, 22 Grant 222; *Brown v. Winning*, 43 U. C. R. 327; Married Women's Property Act, 1884, section 2, sub-section (2); Griffith on Married Women's Property, 5th Ed. 98; Smith on Married Women's Property, 2nd Ed. 49.

10. A married woman can sue in her own name for torts committed before the Married Women's Property Act, 1884, as well as for those committed since: *Severance v. Civil Supply Association*, 48 L. T. N. S. 485; *James v. Barraud*, 49 L. T. N. S. 300; *Weldon v. Winslow*, 13 Q. B. D. 784; *Weldon v. De Bathe*, 14 Q. B. D. 339; *Webster v. Leys*, 10 P. R. 86; Griffith on Married Women's Property, 5th Ed. 28; The Married Women's Property Act, section 2, sub-section (2).

11. A married woman can sue on contracts entered into before or since the first day of July, 1884, without her husband being joined as a party: R. S. O. chapter 125, section 20; The Married Women's Property Act, 1884, section 2, sub-section (2), and section 22; *Kingsman v. Kingsman*, 6 Q. B. D.

122; *Severance v. Civil Supply Association*, 48 L. T. N. S. 485; *James v. Barraud*, 49 L. T. N. S. 300; *Weldon v. Winslow*, 13 Q. B. D. 784; *Weldon v. De Bathe*, 14 Q. B. D. 339; *Webster v. Leys*, 10 P. R. 86; Griffith on Married Women's Property, 5th Ed. 19-28.

12. A married woman cannot sue her husband in tort except it affects her separate property: *Phillips v. Barnet*, 1 Q. B. D. 436; *Summers v. City Bank*, L. R. 9 C. P. 580, 584; *Ramsden v. Brearley*, L. R. 10 Q. B. 147; *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763; *Quartz Hill & Co. v. Beall*, 20 Ch. D. 501; *Allen v. Walker*, L. R. 5 Ex. 187; The Married Women's Property Act, 1884, section 11.

13. A husband is entitled to maintain an action against his wife, and to charge her separate property for money lent by him to her after their marriage, and for money paid by him for her after their marriage at her request, but he is not entitled, even since the Married Women's Property Act, 1884, to maintain an action against her for money lent to her or money paid for her before their marriage at her request: *Butler v. Butler*, 14 Q. B. D. 831.

14. A will made by a married woman during coverture is not, unless it is re-executed after she has become discovert, effectual to dispose of property which she acquires *after* the coverture has come to an end. It would not then be her separate property: Rev. Stat. Ontario, chapter 106, sections 3 and 6; *Willock v. Noble*, L. R. 7 H. L. 580; *In re Price*,

*Stafford v. Stafford*, 28 Ch. D. 709; *In re Young, Trye v. Sullivan*, 28 Ch. D. 705.

15. Equity will not restrain the disposition by a married woman before judgment entered against her of her separate property with a view of making it exigible for her debts: *Robinson v. Pickering*, 16 Ch. D. 660. But possibly a receiver might be appointed: *Bryant v. Bull*, 10 Ch. D. 153.

16. There cannot be judgment and execution against a married woman personally, but only against her separate property: See the authorities cited at proposition No. 6. For Form of Judgment see *Picard v. Hine*, L. R. 5 Ch. 278; *Lawson v. Laidlaw*, 3 App. R. p. 92; *Durrant v. Ricketts*, 8 Q. B. D. 177; *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Consolidated Bank of Canada v. Henderson*, 29 C. P. 549; *Quebec Bank v. Radford*, 21 L. J. N. S. 162; *Cameron v. Rutherford*, 21 L. J. N. S. 162; *Kinnear v. Blue*, 10 P. R. 465; *Bursill v. Tanner*, 13 Q. B. D. 691; *Perks v. Mylrea*, W. N. 1884, 64.

[In the Division Court a judgment against a married woman in an action on contract may be in this form, or to the like effect:

"Judgment for the plaintiff for the sum of \$  
and \$ costs, and I do order that execution  
may issue forthwith (or in days) for said sums,  
on said judgment against the separate property  
which the defendant (*Mary Jones*) was possessed of  
or entitled to on the day of A. D. 188  
(the date on which the contract sued on was entered  
into), and which she was not restrained from

anticipating, and also against all separate property which the said defendant may have acquired since, or may hereafter acquire, and which she is not restrained from anticipating. Dated, &c."

Should the contract sued on have been entered into before the 1st of July, 1884, then that part of the above Form of Judgment relating to property acquired after the date of the contract should be omitted: *Weldon v. Winslow*, 13 Q. B. D. 784.

If the action should be against the husband and wife, and both found liable, the Form of Judgment would be against the husband personally, and against the separate estate of the wife, as if she were sued alone: *Thicknesse on Married Women's Property*, 59.]

17. On a judgment against a married woman in the Division Court she would be subject to the process of judgment summons like any other defendant, and with like consequences: *The Metropolitan Loan and Savings Co. v. Mara*, 8 P. R. 355, 358, 359; *Dillon v. Cunningham*, L. R. 8 Ex. 23; *Meager v. Pellew*, 14 Q. B. D. 973; *Collett v. Dickenson*, 4 Ex. D. 285, 11 Ch. D. 687; *Williams v. Mercier*, 9 Q. B. D. 337; *Lawson v. Laidlaw*, 3 App. R. 77; *Poole v. Canning*, L. R. 2 C. P. 241; *Moses v. Richardson*, 8 B. & C. 421; *Davis v. Ballenden*, 46 L. T. N. S. 797; *Othway v. Wing*, 12 Simons, 90; *Standard Bank v. McGuaig*, 7 P. R. 356; *Crooks v. Stroud*, 10 P. R. 131; *Imperial Bank v. Dickey*, 8 P. R. 246; *Ex parte White*, W. N. 1885, p. 13.

Means of her husband, or which she had not

actually acquired, could not be considered her's for the purpose of any order or proceeding on judgment summons: *Chard v. Jervis*, 9 Q. B. D. 178; *Esdaile v. Visser*, 13 Ch. D. 421; *Harper v. Scrimgeour*, 5 C. P. D. 366; 18 L. J. N. S. 390; *Meager v. Pellew*, 14 Q. B. D. 973, and pages 12 and 13 of W. N. 1885.

Motion for  
judgment.

4. (1) Where the defendant in any action within the meaning (*n*) of section 79 of The Division Courts Act, (*o*) has left with the Clerk a notice (*p*) to the effect in said section provided, the plaintiff in such action may, (*q*) on an affidavit (*r*) made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, serve (*s*) the defendant with a notice of motion to shew cause (*t*) before the Judge of the Division Court in which the action is brought, why the plaintiff should not be at liberty to have final judgment (*u*) entered in his favour by said Clerk for the amount of the debt or money demand sought to be

recovered in such action, together with interest, if any, and costs. A copy of the affidavit shall accompany the notice of motion. The Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Judge that he has a good defence (*v*) to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend the action, make an order (*w*) empowering the Clerk to sign final judgment accordingly.

(2) The application by the plaintiff for leave to have final judgment entered in his favour under the provisions of this section, shall be made on notice returnable not less than two clear days after service.

(3) The defendant may shew cause against such application by offering to bring into Court the amount sought to



be recovered in the action, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part of the plaintiff's claim. And the Judge may, if he thinks fit, order the defendant to attend and be examined upon oath, or to produce any books or documents, or copies of, or extracts therefrom.

(4) In any case if it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall be entitled to have final judgment entered forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of any amount levied, or any part thereof, into Court by the bailiff, the

taxation of costs, or otherwise, as the Judge may think fit; and the defendant may be allowed to defend as to the residue of the plaintiff's claim.

(5) If it appears to the Judge that any defendant has a good defence to the action, or ought to be permitted to defend the action, and that any other defendant has not such defence, and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to have final judgment entered against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

(6) Leave to defend may be given unconditionally, or subject to such terms as to giving security or otherwise, as the Judge may think fit.

(7) Nothing in this section contained

shall apply to any action or suit in which the amount of the debt or claim sought to be recovered does not exceed forty dollars.

(8) The provisions of this section shall be deemed to have been in force on and from the twenty-second day of August, one thousand eight hundred and eighty-one.

(n) OBJECT OF THE SECTION.

This section it will be observed is founded upon and is almost an exact copy of Rule 80 of the Ontario Judicature Act, changes being made only where such are rendered necessary by the difference in practice of the High Court of Justice and the Division Courts. Before this Statute was passed it was held by some County Court Judges that the provisions of Rule 80 of the Ontario Judicature Act applied to Division Courts, and they acted upon it in Division Court cases. The writer did not participate in the views so expressed and acted upon in such cases—Sinclair's D. C. Law, 1884, 93. But now all doubt is removed by the section in question, not only as to cases arising since the passing of the Act, but by sub-section (8) to those cases in which orders for judgment have been made since the 22nd of August, 1881. It will be observed that the 7th sub-section limits the remedy

to cases in which the debt or claim sought to be recovered *exceeds* \$40.

(o) WHAT CASES ARE WITHIN THE ACT.

Wherever a summons can properly issue under the 79th section of the Division Courts Act "for the recovery of *any debt or money demand*," then proceedings can be taken for speedy judgment under this section. But some cases could be the subject of speedy judgment under Rule 80 of the Ontario Judicature Act that would not be so under this section. The Judicature Act allows the application to be made "in all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a Statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque or note, or on a trust": O. J. Act, Rule 14.

Substantially, the provisions of the two Statutes are the same, and the cases that have been decided in England and this Province under the Judicature Act will, with very few exceptions, apply to the section under consideration. As to what is a "debt or money-demand," the reader is referred to the cases collected at pages 99 and 100 of Sinclair's D. C. Act, and at pages 8 and 99 of Sinclair's D. C. Act,

1880, and the notes to the next preceding section.

A garnishee proceeding would not be within this section: *Cameron v. Allen*, 10 P. R. 192. Nor would a case where proceedings are taken against the defendant as an absconding debtor, because other creditors have the right to intervene and contest the plaintiff's claim: Rule 36; *Offay v. Offay*, 26 U. C. R. 363.

A question will at once arise in the application of this section, whether this proceeding for immediate judgment can be taken where the defendant has given notice disputing the jurisdiction of the Court. The writer is of opinion that where there is a *bona fide* notice disputing the jurisdiction, the provisions of this section are inapplicable; that the application can only be made where the defendant has not interposed any reasonable objection to the plaintiff's recovery of judgment. But the question of jurisdiction is a very important part of the judicial consideration of the case, and is usually settled before the merits of the action are investigated. If a plaintiff has no legal authority to sue in a particular Court, the defendant has the undoubted right to raise that question for decision. The trying of an action out of the proper Division would in many cases work a great hardship and be productive of injustice. Indeed, in small sums it would frequently pay a defendant to settle the claim, though unfounded, rather than lose the time and be at the expense of resisting the action at a place far distant. It is therefore not unfrequently of the highest consequence to the defendant that every reasonable facility for ques-

tioning the jurisdiction of a Division Court should be afforded him. It will be observed that we have used the expression "*bona fide notice*," for if it should not be so, if it should be given for the mere purpose of gaining time and delaying the recovery of judgment by the plaintiff, or untrue in fact to the knowledge of the defendant or his agent giving it, or should be purely fictitious and without grounds to support it, in fact a trick or a fraudulent device for the purpose of preventing the just operation of this Statute, it would not, it is submitted, interpose a barrier to the plaintiff's recovery. It should be treated as a sham plea was formerly treated, and not stand in the way of an order for judgment: Stephen on Pleading, 6th Ed., 348; Arch. Pract., 12th Ed., 248, 292, and cases there cited; Lush's Pract., 450, 452, and cases cited; *Nutt v. Rush*, 4 Ex. 490; *Levy v. Railton*, 14 Q. B. 418; *Bowes v. Howell*, 2 C. L. Cham. 134; *Bank U. C. v. Ketchum*, 4 U. C. L. J. 69; *Bearss v. Neville*, 1 P. R. 361; *McMaster v. Beattie*, 6 P. R. 162; *Met. B. & S. Society v. Rodden*, 6 P. R. 294; *Turner v. Neill*, 6 P. R. 295; *Davis v. Code*, 7 P. R. 2; *Dickson v. Grimshawe*, 10 U. C. L. J. 192; *Wanzer v. Stoutenburgh*, 13 U. C. R. 184.

In the last case the late Chief Justice Draper is reported as saying: "The plea *may* be true, but if otherwise, it is an abuse of the right to plead to frame ingeniously drawn falsehoods to delay a party recovering an honest debt, and to try and defeat justice." The same may be said of a fraudulent or fictitious notice disputing jurisdiction. The giving of such a notice would also be a fraud

on this Statute, and should not be allowed to stand in the way of an order for judgment: *Griffith v. Brown*, 21 C. P. 12; *In re Hoskins*, 1 App. R. 379; *Young v. Smith*, 29 C. P. 109. But the inference should be strong and pregnant, almost irresistible, before the notice should be treated as a sham notice, or not *bona fide*: *Phillips v. Bruce*, 6 M. & S. 134. If there is a reasonable doubt in the matter, it is submitted that the notice should be upheld. Each case, however, must depend upon its own circumstances, but there are cases where the giving of notice disputing the jurisdiction would be manifestly untrue, and should not prevent the application being granted. Take the case of a promissory note for a sum between \$100 and \$200 payable at a certain Bank, in a particular place, and sued upon in the Court for the Division in which that Bank is situate, under the 8th section of the Division Courts Act, 1880. It would, it is submitted, be manifestly unjust in such a case to allow a notice disputing jurisdiction to bar the granting of the order. The same may be said of an action under the 9th section of that Act. On the other hand, if the particulars of demand shewed a cause of action obviously beyond the jurisdiction of the Court, presumably the notice disputing jurisdiction would be properly given. The Judge must see that there is an absence of good faith or honest contention raised by the notice before he would be justified in making the order, but if the facts irresistably bring him to the conclusion that bad faith did exist, it would equally be his duty we submit to grant the order. It may be urged that this would

be in effect trying the question of jurisdiction in a summary manner. If so what objection could there be to it? Every Court has the inherent power to prevent the commission of fraud upon its proceedings, or its process being used for a fraudulent purpose: See *Hill v. Hart-Davis*, 26 Ch. D. 470.

A Statute cannot be evaded with impunity where such evasion is clear and manifest, and from the inherent attribute of all Courts of Justice the process and proceedings thereof cannot be resorted to in violation of the spirit of an Act of Parliament, and in doing so to do injustice to others. The Judges of the Division Courts possess the right, in view of the 244th section of the Act under which these Courts exist, to adopt and apply the general principles of practice in the Superior Courts in cases not provided for by the Division Courts Acts. Here the Statute does not make provision for any case of the kind under consideration. The Judges have therefore, it is submitted, not only from this section the power to apply the general principles of practice to such a case as we are considering,—*Re Fletcher and Noble*, 9 P. R. 255; *Bellamy v. Hoyle*, L. R. 10 Ex. 220, 229,—but also in virtue of its constitutional authority, the right to deal with a fraudulent or fictitious notice disputing jurisdiction. The Superior Court Judges had jurisdiction as of common law right to deal with sham pleas in a summary manner and allow judgment to be signed, as the authorities already cited will shew, and we see no objection to applying the same principles of practice in the case we are considering, and allowing it to be done here also. It may also be urged that



the question of jurisdiction cannot be inquired into except at the sittings of the Court. But the writer is not aware of any Statute fixing that as the time of considering the question. It would be quite reasonable that a defendant filing a sham notice of dispute should at the earliest possible moment be called upon to shew cause why it should not be removed from the files of the Court. In many cases too it would be more convenient and inexpensive to settle the question of jurisdiction first. To allow a notice of dispute, whether well or ill founded, to prevent the making of the order, would virtually thwart the beneficial operation of the Statute: *Wallingford v. Mutual Society*, 5 App. Cas. 699, 700, *per* Lord Hatherly. That, if possible, should be avoided. It is submitted, therefore, that the question of *bona fides* of the notice disputing jurisdiction can be inquired into on an application for an order for judgment, and if it appears to the Judge that it is manifestly fraudulent or fictitious and without merits, and given merely for the purpose of delaying judgment, it should not be any obstacle in the way of judgment being ordered: See the remarks of Cotton, L. J., in *The Mersey Steamship Co. v. Shuttleworth*, 11 Q. B. D., at page 532, and section 8, sub-section 38, of the Interpretation Act of Ontario.

It is suggested that in the plaintiff's affidavit for the order, it should be stated that notice disputing the jurisdiction had not been given to the Clerk. If jurisdiction is disputed, and the plaintiff is of opinion that he can successfully make out a case for an order, according to the

views above expressed, the affidavit or affidavits must be framed specially to support that branch of the application.

(p) AFTER NOTICE OF DEFENCE.

Proceedings under this section can only be taken after the defendant has left with the Clerk a notice of dispute, as provided for by the 79th section of the Division Courts Act. The giving of notice of set-off or other statutory defence, or paying money into Court, or pleading a tender, is declared by Rule 20 to be equivalent to giving the ordinary notice of defence. By that section the defendant may by his notice either dispute the whole or part of the plaintiff's claim. The notice must be in writing according to the 8th section of this Act. Should judgment be signed by the Clerk in default of notice disputing the plaintiff's claim, or should the time for entering judgment have expired, but the Clerk had not entered up the judgment, and should the Judge think proper to give leave to the defendant in either of such cases to come in and defend, it would nevertheless be the plaintiff's right after notice given to apply for an order for judgment under this section. The order for leave to defend in such cases could not place the defendant in any better position than if he had not made default in giving notice disputing the plaintiff's claim. The notice may be given by the plaintiff in person, or by an agent, even though the latter be a married woman or an infant: Broom's Common Law, 5th Ed. 518, and cases cited in note (s) to this section.

## (q) THE PROCEEDING IS OPTIONAL.

As will be observed by the permissive word used, the plaintiff has the right to make the application or he may wait for judgment until the regular sittings of the Court when the summons is returnable. It is entirely optional with him what course he will pursue: *R. v. S. Eastern Ry. Co.*, 3 H. L. Cas. 471; and his making the application and failing, or his not doing so, cannot affect his rights on the merits in any way whatever: See *Gill v. Woodfin*, 25 Ch. D. 707; *Gilbings v. Strong*, 26 Ch. D. 66. But in the case of *Stewartstown Loan Co. v. Daly*, 12 L. R. Irish, 418, it was held that if a plaintiff, after appearance by the defendant, takes a deliberate step to have an action tried by a jury, he cannot then move for judgment in this summary manner. The writer has been unable to discover any case, either in the English Courts, or the Courts of this Province, in which the same question arose: See *Woodruff v. McLennan*, 21 L. J. N. S. 237.

## (r) THE PLAINTIFF'S AFFIDAVIT.

The affidavit which the Statute requires must be made, *R. v. Judge of the Marylebone County Court*, 50 L. T. N. S. 97, though the defendant might, by distinctly waiving its production or the allegation of certain necessary facts, and agreeing to the plaintiff's statement of facts, give the Judge power to make the order: *Sinclair's D. C. Act, 1880*, p. 27; *Ex parte Butters, Re Harrison*, 43 L. T. N. S. 2; *In re Guy v. G. T. Ry. Co.*, 10 P. R. 372; and the consent to adjudication without the affidavit could not be withdrawn: *Harvey v. Croydon Union Rural*

*Sanitary Authority*, 26 Ch. D. 249. At page 255 of the report, Cotton, L. J., says: "If a consent has been duly given, it is not right that it should be arbitrarily withdrawn." See also the remarks of Lord Coleridge, C. J., at page 256, who says "that a consent given by counsel, with authority, and with full knowledge of the facts, is binding, and cannot be withdrawn."

As to the formal part of all affidavits the writer refers to Sinclair's D. C. Act, 184, 269, and Sinclair's D. C. Act, 1880, pages 20 and 21; *Ex parte King*, 25 L. T. N. S. 935.

The affidavit can be made by the plaintiff himself "or by any other person" who can swear to the facts necessary to be shewn. The words of the section under consideration are more comprehensive than sub-section (5) of section 8 of the Division Courts Act of 1880, where in an application for change of venue "the affidavit must be made by the defendants, or one of them, or by their or his attorney or agent, in case satisfactory reasons are given why the affidavit is not made by a defendant." As was pointed out at page 23 of Sinclair's D. C. Act, 1880, on the authority of *Frederici v. Vanderzee*, 2 C. P. D. 70, and *The Bank of Montreal v. Cameron*, 2 Q. B. D. 536, there was a difficulty in a defendant corporation applying for such change, for the reason that there was no person to make the necessary affidavit. In support of the same view the reader is also referred to *Tiffany v. Bullen*, 18 C. P. 96, *per* Richards, C. J.; *Freehold Loan and Savings Co. v. Bank of Commerce*, 44 U. C. R. 284; *Carlisle v. Tait*, 32 C. P. 43; *The Bank of Toronto v. McDougall*,

15 C. P. 475, and particularly *Martin qui tam v. The Consolidated Bank*, 45 U. C. 163, and *Dickson v. The Neath and Brecon Ry. Co.*, L. R. 4 Ex. 87. The section in question by its express language obviates the difficulty which these cases shew, by allowing "any other person" than the plaintiff to make the necessary affidavit. Should the plaintiffs be a corporation, then any of its officers, or anyone else acquainted with the facts, could make the affidavit required. The affidavit may be made, the application instituted and the order for judgment obtained in cases where the defendants are a corporation: *Shelford v. The Louth and East Coast Ry. Co.*, 4 Ex. D. 317, reversing *Muirhead v. Direct U. S. Cable Co.*, 27 W. R. 708; or are infants: *Wallis v. Wallis*, 13 L. R. Irish 258. The affidavit should not only verify the cause of action, but also pledge the deponent's belief that there is no answer to the plaintiff's demand: *Kiely v. Massey*, 6 L. R. Irish 445. In one case in the Irish Courts it was held that where the plaintiff's affidavit stated that he was "advised and believed defendant had no defence on the merits to the action," it was sufficient: *Manning v. Moriarty*, 12 L. R. Irish 372. In view of the decisions in our own Courts and the language employed in the Statute, it is exceedingly doubtful if the latter decision would be followed in this Province: *Bullen v. Lingham*, 2 U. C. L. J. 231; *Connor v. McBride*, 2 U. C. L. J. 232; *Cataraqui Road Co. v. Dunn*, 3 U. C. L. J. 27; *Hazlewood v. De Bergue*, 3 U. C. L. J. 28; *Jones v. De Bergue*, 3 U. C. L. J. 31; *McLaren v. Sudworth*, 4 U. C. L. J. 233; *Boyd v. Haynes*, 5 P. R. 15; *Builder v. Kerr*, 7 P. R. 323.

In *Begg v. Cooper*, 40 L. T. N. S. 29, decided under the English Judicature Amendment Act of 1875, Order XIV, Rule 1, (a) it was held that the affidavit was not a condition precedent to the service of a Judge's summons (as the English practice then was and is), for judgment under that order. It is difficult to say what view should be taken of the 80th Rule of our Judicature Act and this section on this point. Although a notice of motion might be irregular without a copy of the affidavit accompanying it, yet, the writer thinks, on the views expressed by the Judges in the last case, that it would only be a ground for enlarging the application until the plaintiff could let the defendant have a copy of the affidavit two clear days, pursuant to sub-section (2). It also appears from the reasoning in that case, and applying the general principles of practice, that if the affidavit should be defective the Judge could enlarge the application with a view of having the defect remedied upon such terms as would be just. See also Rule 118 of the D C. Rules.

The right to obtain judgment in this summary way is an extraordinary one, and all facts necessary to be shewn, and the observance of all requirements of the Statute, are conditions precedent to the due making of the order: *R. v. Judge of the Marylebone C. C.* 50 L. T. N. S. 97; *Lloyds' Banking Co. v. Ogle*, 1 Ex. D. 262; *Runnacles v. Mesquita*, 1 Q. B. D. 416; *Barber v. Russell*, 9 P. R. 433.

The debt or cause of action must be *positively* sworn to; there should not be any doubt appearing on the affidavit in that respect. The cause of action

must be *verified* by the affidavit. It is impossible to say what would satisfy the section in that respect, for each case must depend on its own circumstances, but the suggestions hereinafter made of the form of affidavit may be referred to on that subject with advantage.

The notice of motion and affidavit of service should if possible be filed with the Clerk before the return day : *Re Rosier, Jones v. Bartholomew*, 49 L. T. N. S. 442 ; *Sear v. Webb*, 49 L. T. N. S. 94 ; and forthwith transmitted to the Judge : Rule 86. By Rule 20, if a defendant gives notice of set-off or other statutory defence, or pays money into Court, or pleads a tender, he shall be deemed to have sufficiently given the Clerk notice of disputing the plaintiff's claim within the meaning of the 79th section of the D. C. Act. It may be doubted whether the cases mentioned in this Rule might be considered such notice as this section speaks of, but assuming such to be so, the plaintiff could not obtain an order for judgment for the whole or any part of the plaintiff's claim to which any of these defences applied, and in the case of counter-claim being set up, the plaintiff could not, it is submitted, discontinue his action under Rule 138 : *McGowan v. Middleton*, 11 Q. B. D. 464 ; *The Mersey Steamship Co. v. Shuttleworth*, 11 Q. B. D. 531. As to the requirements of the affidavit when jurisdiction is disputed, the reader is referred to note (o) to this section.

The following form of affidavit may be used when made by the plaintiff :

In the                      Division Court for the County  
of

Between                      A. B., PLAINTIFF,

AND

C. D., DEFENDANT.

I, A. B., of the              of              in the County of  
and Province of Ontario,              make oath and say :

1. That I am the above named plaintiff [or "*one of the above named plaintiffs*"] in this cause.

2. That this action was commenced on or about  
the              day of              A. D. 188              by a special summons  
duly issued out of this Court, in pursuance of the  
79th section of the Division Courts Act, for the  
sum of \$

3. That the annexed paper marked "A" is a true  
copy of the particulars of the plaintiff's claim or  
demand in said action. [Or, "*That the following  
is a true copy of the particulars of the plaintiff's  
claim or demand in said action,*" giving in either case  
*the particulars verbatim.*]

4. That I verily believe said summons, together  
with a true copy of said particulars of claim or de-  
mand, and all notices and warnings required to be  
given, were duly served on the defendant in this  
cause.

5. That subsequent to said service the defendant  
left with the Clerk of this Court a notice in writing  
to the effect that he disputed the claim sued for  
herein.

6. That the defendant at the commencement of  
this action was and still is truly and justly indebted  
to me in the sum of \$              in respect of the  
matters in the said particulars of claim or demand  
mentioned.



7. [*Here state as concisely as is consistent with clearness the facts upon which the plaintiff's claim is founded. Mere matters of evidence need not necessarily be stated, but a good cause of action must be disclosed, and the plaintiff's claim in respect of it verified, and in some cases it may be advisable to state the evidence by which it is supported. The form of affidavit must necessarily vary according to the facts of each particular case. The statement of facts may be confined to one paragraph, or divided into several, as may be found most convenient. Each paragraph should contain as far as possible a separate allegation of fact. The affidavit should be made as strong as possible, and any facts tending to shew an admission of the claim by the defendant should be distinctly stated.*]

8. In my belief there is no defence to this action, and that the notice in writing left by the defendant with the Clerk of this Court that he disputed the claim sued for herein, has been so left for purpose of delay only.

9. That the defendant has not left with the Clerk of this Court any notice to the effect that he disputes the jurisdiction of this Court.

Sworn, &c.

[If any person other than the plaintiff makes the affidavit, the above form can easily be adapted to it. Where the defendant disputes the jurisdiction see note (c) to this section.]

(8) SERVE DEFENDANT WITH NOTICE OF MOTION.

The question will at once arise how service of notice of motion can properly be made. Undoubtedly, if personal service is duly made—Sinclair's

D. C. Act, 93, 94—subsequent proceedings on such notice can be taken as of course. But can any other than personal service be effected? As will be seen hereafter it certainly can.

The 125th Rule of the Division Court Rules makes provision for the plaintiff and defendant each leaving with the Clerk his address, so that notices might be sent to such address, and on such being done that "sufficient service" might be considered as made: Sinclair's D. C. Act, 266. The whole scope and language of this Rule was intended to meet cases of ordinary procedure, and to prescribe a method by which the Clerk should communicate with the parties, and was not, the writer submits, intended to meet a case of this kind.

In many cases the notice would not reach its destination by mail before judgment would be entered, if service of the notice of motion under Rule 125 could be made. Service of notice on Friday for the following Monday would be sufficient service, yet, in places where there is only a mail service twice or three times a week, judgment on such notice could be ordered and entered on Monday morning, perhaps before the letter had left the post office in which it was deposited. Neither the Rule of Court nor the Statute should be read so as to produce such injustice: *Ex parte Banco de Portugal, In re Hooper*, 11 Ch. D. 317. Lord Justice Bramwell thus expresses himself at page 322 of the report: "I think, as I have had occasion to say more than once, that when a particular construction of an Act of Parliament, or a particular proposition of law, leads to a hardship,

there is a presumption against that construction or proposition being right, because I do not think that our law does, usually at least, lead to hardship." So also, substantially the same view was expressed by Lord Blackburn in the House of Lords, in the case of *The Countess of Rothes v. Kirkcaldy Waterworks Commissioners*, 7 App. Cas. at page 702. That learned Judge says, "I quite agree that no Court is entitled to depart from the intention of the legislature as appearing from the words of the Act, because it is thought unreasonable. But when two constructions are open, the Court may adopt the more reasonable of the two."

If, therefore, there is any doubt as to the meaning to be given to the Rule of Court already adverted to, that doubt should, it is submitted, be given in favour of a just and reasonable interpretation, and not one productive of hardship and injustice. But even if it did apply, in the great majority of cases the defendant does not "give to the Clerk his address" when entering his notice of dispute, and the notice must be received whether he does so or not. In such cases, therefore, taking the most favourable view of the Rule, the plaintiff would have to effect service as if no such Rule was in existence. We will therefore proceed to shew how service, other than personal service, can be effected of this notice of motion.

In *Ward v. Vance*, 9 U. C. L. J. 214, Adam Wilson, J., says in regard to the service of an attaching order and summons to pay over under the garnishment clauses of the Common Law Procedure Act: "The Statute does not require in express terms"

(as here) "that there shall be a personal service, as our King's Bench Act of 1822 did of the *Ca. Re.*, upon the defendant; and I cannot say that the rule of law is so stringent as to require a personal service of a copy of the attaching order, or to make void every other service than a personal service. On the contrary, I am inclined to think that personal service is not imperatively demanded, unless in those cases where it is sought,—that is where it is the purpose and object, to charge the party with a contempt for not appearing to, or for not performing some act required by the summons, writ, rule or order."

Service on the defendant's wife at the dwelling house of the defendant would be sufficient: *Hanns v. Johnston*, 3 Ont. R. 100; *Trust and Loan Co. v. Jones*, 8 P. R. 65. See, however, *Hays v. Armstrong*, 7 Ont. R. 621.

The notice of motion could be served by leaving it at the place of residence of the defendant with some grown up person there dwelling: *In re A Solicitor*, 14 Ch. D. 152; *Carlisle v. Orde*, 7 C. P. p. 459. The motion in the first case was for the issue of a writ of attachment against a solicitor for disobedience to an order made on an original petition requiring him to deliver certain documents of title to his client, the petitioner. The order made on the petition had been served personally on the solicitor, and the notice of motion had been served by leaving it at his residence. The only question was whether the last service was sufficient or not. Jessel, M. R., held that it was. He says at page 153 of the report: "The ordinary way before the

Judicature Acts in which a notice of motion was given in a matter was by leaving it at the place of residence of the respondent, and I see no reason for changing that practice. I think, therefore, that the service in the present case was sufficient." The cases of *Jones dem. Griffiths v. Marsh*, 4 T. R. 464; *R. v. Justices of the North Riding of Yorkshire*, 7 Q. B. 154; *Murray v. G. W. Ry. Co.*, 6 P. R. 211; are to the same effect. The case of *Hogg v. Brooks*, 14 Q. B. D. 475, was decided on the strict language of the lease in question there, and does not impugn the authority of the previous cases here cited.

Service on a clerk of the defendant at the defendant's counting-house would not be sufficient: *Rowland v. Vizetelly*, 6 M. & G. 723; *Warwick v. Bacon*, 7 M. & G. 961; nor by leaving the notice at the club-house of the defendant: *Davies v. Westmacott*, 7 C. B. N. S. 829; nor by leaving it with the defendant's warehouseman at the defendant's warehouse, that being his place of business: *Ibotson v. Phelps*, 6 M. & W. 626.

Where service is made on a domestic servant of the defendant at the defendant's residence, the affidavit should shew that she is the defendant's servant: *Alanson v. Walker*, 3 Dowl. 258.

Service on a workman on the defendant's premises would be insufficient: *Hitchcock v. Smith*, 5 Dowl. 248.

"Service on a housekeeper at a place where several persons are residing, clearly will not do, without shewing that she had authority to receive papers for the defendant": *Per Maule, J.*, in *Lewis v. Blurton*, 7 C. B. 102.

Leaving the notice of motion with the laundress at the defendant's office would not be good service: *Dodd v. Drummond*, 1 Dowl. 381; *Kent v. Jones*, 3 Dowl. 210; *Alanson v. Walker*, 3 Dowl. 258; *Brown v. Wildbore*, 1 M. & G. 276. Much less with the servant or assistant of the laundress: *Smith v. Spurr*, 2 Dowl. 231. Nor with the landlord or landlady of the house where the defendant lodges: *Salisbury v. Sweetheart*, 5 Dowl. 248; *Biddulph v. Gray*, 5 Dowl. 406; *Gardner v. Green*, 3 Dowl. 343. Nor upon a female servant at the lodgings of the defendant: *Price v. Thomas*, 11 C. B. 543.

Service would not be good by putting the notice of motion under the door or into the letter-box of the defendant's office: *Strutton v. Hawkes*, 3 Dowl. 25; *Braham v. Sawyer*, 1 D. & L. 466; *Consumers' Gas Co. v. Kissock*, 5 U. C. R. 542; *Grand River Nav. Co. v. Wilkes*, 8 U. C. R. 249; *McCallum v. Pro. Ins. Co.*, 6 P. R. 101. Nor by throwing it over the defendant's fence to the defendant's son, who refused to have anything to do with it: *McGuin v. Benjamin*, 1 Cham. R. 142.

Where service is made on some grown up person at the defendant's residence besides his wife, the affidavit of service should shew that the grown up person was in some way connected with defendant as a member of his family or otherwise, "that she was more than casually there": *per* Draper, C. J., in *Carlisle v. Orde*, 7 C. P. 459. If served on the defendant's wife the affidavit should shew it, and if on some other person the name should properly be given.

The case of *Hogg v. Turner*, 2 L. J. N. S. 267, is

difficult to reconcile with those cases which decide that service at a man's residence is good service on him, and it cannot be recognized as law.

Service on a Good Friday or other holiday would be good: *Clarke v. Fuller*, 2 U. C. R. 99; but not service on Sunday: *R. v. Leominster*, 2 B. & S. 391; *Sinclair on Absconding Debtors*, p. 45.

In the High Court of Justice the time for delivering a statement of defence does not run between the time when notice of motion is given and when disposed of: *Hobson v. Monks*, W. N. 1884, 8.

Service on one of several partners would not be good service of notice of motion on all, because the provisions of the Ontario Judicature Act are not in that respect applicable: *Clarke v. Macdonald*, 4 Ont. R. 310; *Bank of Ottawa v. McLaughlin*, 8 App. R. 543; *Sinclair's D. C. Law*, 1884, 96, 157; *Jackson v. Litchfield*, 8 Q. B. D. p. 477, *per* Brett, L. J.; *Walker v. Rooke*, 6 Q. B. D. 631.

As to proceedings against a firm in the High Court the reader is referred to: *Pollock v. Campbell*, 1 Ex. D. 50; *Ex parte Young*, 19 Ch. D. 124; *Jackson v. Litchfield*, 8 Q. B. D. 474; *Clark v. Cullen*, 9 Q. B. D. 355; *Davis v. Morris*, 10 Q. B. D. 436; *Adam v. Townend*, 14 Q. B. D. 103; *Taylor v. Collier*, W. N. 1882, 83; *Munster v. Railton*, 10 Q. B. D. 475; *S. C. 11 Q. B. D. 435*, W. N. 1885, 126.

Service of notice of motion could be made on a married woman as if she was a *feme sole*: 47 Victoria (Ontario), chapter 19, section 2, sub-section (2); *Bursill v. Tanner*, 13 Q. B. D. 691; *Gloucestershire Banking Co. v. Phillipps*, W. N. 1884, 72, 76;

*Quebec Bank v. Radford*, 21 L. J. N. S. 162; *Cameron v. Rutherford*, 21 L. J. N. S. 162.

The notice could be given by a solicitor or agent for the plaintiff, and even if given without his authority, but in the plaintiff's name, it might be ratified by him: *Ancona v. Marks*, 7 H. & N. 686; *Blake v. Walsh*, 29 U. C. R. 541, 545.

The late Division Court Rule, framed by the Board of County Judges, respecting applications in the Division Courts (to be found *post*), cannot apply to this case where specific statutory provision is made that the motion must be made by notice of motion.

The Statute prescribes a "notice of motion," and any other form of application would not be proper.

Sunday would, it is submitted, be reckoned as one of the two clear days, the 457th Rule of the Ontario Judicature Act not applying to Division Courts, nor would the service after two o'clock in the afternoon of a Saturday be reckoned as of the Monday following: *Sinclair's D. C. Act*, 1880, p. 19, 46, 80; *Clarke v. Macdonald*, 4 Ont. R. 310; *Bank of Ottawa v. McLaughlin*, 8 App. R. 543; *McLean v. Pinkerton*, 7 App. R. 490 and page 21 *ante*.

The 62nd section of the Division Courts Act of 1880 could not be invoked in aid of substitutional service being ordered. That section only provides for substitutional service of a "summons upon the defendant, primary debtor or garnishee." It cannot in any way be read as applicable to this notice of motion.

Service would be good on some one the defendant designated as his agent for the purpose of being



served, for a solicitor is simply the agent of his client, possessed of the implied authority to accept service of papers in the cause for his client: Lush's Practice, 249, 250.

But a very serious question arises as to the validity of service of notice of motion on some one who is said to be the agent of the defendant, from the fact that he may have entered for the defendant the notice disputing the plaintiff's claim or demand. In the High Court of Justice it is the practice to serve the defendant's solicitor, entering the appearance with this notice of motion, and no doubt it is proper to do so, but in the Division Court, solicitors as such are not recognized, except in some particular instances, as in the 16th, 18th, 20th, 21st, 22nd and 59th sections of the Division Courts Act of 1880. In the High Court, a solicitor having appeared for a defendant, his authority is presumed to continue until judgment so far as the relation of parties is concerned, or until there is some distinct termination of it. Will the same rule exist in Division Courts? Will the fact that a solicitor enters a notice disputing the plaintiff's claim, under the 79th section of the Division Courts Act, whether stated in the notice (as is sometimes the case) or not that he gives it as solicitor for the defendant, entitle the plaintiff to serve the notice of motion on him? Will the leaving of the notice of dispute by one who is not a solicitor, as agent for the defendant, render the service of notice on him sufficient under this section? From the nature and constitution of the Division Courts, their purpose and object, the summary character of their

practice, the absence of formal pleadings, the right of all persons to appear as agents at the hearing of causes, the absence of any responsibility of solicitors or others as officers of such Courts, and upon the general principles of law relative to principal and agent, the writer is of opinion that the leaving with the Clerk of the Court the disputing notice by a solicitor or other agent, does not in itself constitute him an agent, clothed with the authority to receive, or warrant the plaintiff in serving him with the notice of motion under this section. It is quite within the scope of Division Court practice that a person may be retained or employed to give the disputing notice only, without regard to the subsequent conduct of the suit. One test that might be applied would be if an agent had authority to give the disputing notice only, could he bind his client by a *bona fide* settlement of the suit without express authority? : *Chown v. Parrott*, 14 C. B. N. S. 74 ; *Prestwich v. Poley*, 18 C. B. N. S. 806 ; *Butler v. Knight*, L. R. 2 Ex. 109. Or would he have power to accept service of notice to admit and produce, give admissions perhaps of the making of the note sued upon (if such it should be), consent to judgment, subject the defendant to the consequences of not producing papers under notice to produce, or do the many other things which a solicitor has in the higher courts the implied authority to do? At page 524 of Broom's Commentaries on the Common Law, 5th Ed., the learned author in discussing this subject says : "Let us take, on the other hand, the case of an attorney, who (without having a general retainer) is author-

ized to do some particular act; his authority will then necessarily be confined to doing such act; and his right to recover for work done and matters incidental thereto, as against his client, will depend upon whether the business charged for fell within the scope of the authority with which he was invested or not."

There is no doubt but that the defendant could give the notice by an agent, on the general principle that whatever a person *sui juris* may do himself he may do by another, and such agent may be a minor or a married woman: *Lord v. Hall*, 8 C. B. 627; *Lindus v. Bradwell*, 5 C. B. 583; *Cotes v. Davis*, 1 Camp. 485; Story on Agency, 4th Ed. 6; *Jolly v. Rees*, 15 C. B. N. S. 628.

"The fact of agency may be proved by shewing an express authority given to the alleged agent; by shewing circumstances from which the requisite authority must necessarily or may reasonably be inferred, or by establishing the existence of a particular relation between parties, whence an authority to contract will be implied by law": Broom 519. Now keeping in mind the principles, and applying the law just expressed, can it be said that the circumstance of a person giving the notice disputing the plaintiff's claim, without further evidence of authority, establishes the existence of any such relation between the plaintiff and such agent, as to invest the latter with authority to accept service of notice of motion for judgment under this section? The writer is unable to come to the conclusion that it would. Evidence of

express authority to do so would be an entirely different thing : *Broom* 516.

If a person assumes to have authority to accept service of the notice of motion when he had not, he might be held responsible for warranting that he possessed an authority which he had not, within the principle of such cases as *Collen v. Wright*, 7 E. & B. 301 ; *Richardson v. Williamson*, L. R. 6 Q. B. 276 ; *Weeks v. Propert*, L. R. 8 C. P. 427. In *Re National Coffee Palace Co. Ex parte Panmure*, 24 Ch. D. 367 ; *Chapleo v. Brunswick P. B. Society*, 6 Q. B. D. 696 ; but the Defendant should not be prejudiced by the unauthorized or fraudulent act of a solicitor or agent : *Reynolds v. Howell*, L. R. 8 Q. B. 398 ; *Nurse v. Durnford*, 13 Ch. D. 764 *Williams v. Preston*, 20 Ch. D. 672 ; *Miller v. Hill*, 4 L. J. N. S. 78 ; and if judgment should be obtained by service of some one who had no authority to accept service, it would be set aside, and the defendant restored to his original position. Arch. Pract. 13th Ed. 86, 103 ; *Massey v. Rapelje*, 5 C. P. 134.

Where one of three defendants was served with a summons and he caused an appearance to be entered for all three, it was held that the defendant served had no power to enter a defence for the others : *Roissier v. Westbrook*, 24 C. P. 91. The case of *Warely v. Poapst*, 7 U. C. L. J. 294 cannot now be considered law since the cases of *Reynolds v. Howell*, L. R. 8 Q. B. 398, and *Nurse v. Durnford*, 13 Ch. D. 764, but the right to take advantage of a judgment entered upon insufficient service may be waived by delay, with knowledge of it : *Moran v. Schermerhorn*, 2 P. R. 261 ; *Smith v. Roblin*, 13 C. P.

480; *Kerr v. Malpus*, 2 P. R. 135, but not in ignorance of it: *Johnson v. The Credit Lyonnais Co.*, 3 C. P. D. p. 40, *per* Cockburn, C. J.; *Westloh v. Brown*, 43 U. C. R. 402; *McKenzie v. British Linen Co.*, 6 App. Cas. 82; *Walker v. Hyman*, 1 App. R. 345; *Crossman v. Shears*, 3 App. R. 583; *Forristal v. McDonald*, 9 Sup. R. 12; *Carr v. L. & N. W. Ry. Co.*, L. R. 10 C. P. 307; *Mason v. Bickle*, 2 App. R. p. 298; *Miles v. McIlwraith*, 8 App. Cas. 120; *DeBussche v. Alt*, 8 Ch. D. 286; *Polak v. Everett*, 1 Q. B. D. 669.

If no irreparable wrong would be done a plaintiff who had obtained judgment by default, lapse of time would not be a bar to an application to set it aside: *Atwood v. Chichester*, 3 Q. B. D. 723.

Where the affidavit is defective and an application upon it fails in consequence, a second application can be made on fresh materials. The decision on the first application simply means that a case for judgment was not made out on the then materials: *Wagstaff v. Jacobowitz*, W. N. 1884, 17.

By appearing and arguing the question on the merits without objection, the defendant would thereby waive any defect in the notice, or any objection to the sufficiency of the time of service, or even to any notice at all: *Park Gate Iron Co. v. Coates*, L. R. 5 C. P. 634; *R. v. Stone*, 1 East. 649; *R. v. Shaw*, 12 L. T. N. S. 470; *R. v. Smith*, L. R. 1 C. C. 110; *Blake v. Beech*, 1 Ex. D. 320; *R. v. Hughes*, 4 Q. B. D. 614; *Ward v. Raw*, L. R. 15 Eq. 83; *R. v. Crouch*, 35 U. C. R. 433, and *ante* page 33.

The notice must be served "not less than two clear days" before its return. This means two days *at least*, that is, *excluding* the day of service

and the day when it is returnable before the Judge : *In re Railway Sleepers Supply Co.*, W. N. 1885, 85 ; *R. v. Justices of Shropshire*, 8 A. & E. 173 ; *Mitchell v. Foster*, 9 Dowl. 527 ; *R. v. Aberdare Canal Co.*, 14 Q. B. 854 ; *R. v. Justices of Middlesex*, 9 Jur. 758 ; *Rumohr v. Marx*, 19 L. J. N. S. 10. But in the Division Courts inclusive of Sunday : *Clarke v. Macdonald*, 4 Ont. R. 310 ; *Bank of Ottawa v. McLaughlin*, 8 App. R. 543 ; Sinclair's D. C. Act, 1880, 19, 46, 80 ; *McLean v. Pinkerton*, 7 App. R. 490.

Service can only be effected of any paper by mail, so that time begins to count from mailing, in pursuance of a previous agreement to that effect : *Robson v. Arbutnott*, 3 P. R. 313 ; *McDonough v. Alison*, 9 P. R. 4.

Service on a corporation, to be effectual, must be given to the corporation itself through its proper officers. Casual knowledge acquired by one of the officers would not be good service : *Societe Generale de Paris v. Tramways Union Co.*, 14 Q. B. D. 424 ; section 11 of this Act.

Substitutional service of the notice could not, it is submitted, be ordered under the 62nd section of the Division Courts Act, 1880, but that service of it could be made on one occupying the position of "agent" under the 11th section of this Act.

The notice of motion may be in the following form, or to the like effect :

In the                    Division Court of the County [or, united Counties] of

Between                    A. B., PLAINTIFF,

AND

C. D., DEFENDANT.

Take notice that a motion will be made on behalf of me, the above named plaintiff, before the Judge of this Honourable Court, at his Chambers in the Court House, in the        of       , in the said County of       , on        day, the        day of        A. D. 188   , at        o'clock in the        noon, or so soon thereafter as the motion can be heard, for an order that I, the plaintiff herein, be at liberty to have final judgment entered in my favor in this cause by the Clerk of this Court for the amount of the debt or money demand sought to be recovered in this action, together with interest, if any, and costs, and that in support of such motion will be read the affidavit of me, the plaintiff herein, a true copy of which accompanies this notice.

Dated this        day of        A. D. 188   .	
To C. D.,	Yours, &c.,
the above named De-	A. B., the Plaintiff,
fendant herein.	or,
	E. F., Solicitor [or agent]
	for the above named
	Plaintiff in this action.

[N. B.—If given to any other person who has authority to receive the notice, address it accordingly; and if any other affidavit is to be used reference should be made to it and a copy served.]

(t) EXAMINATION OF THE DEFENDANT.

This provision for the examination of the defendant is evidently made for the purpose of better elucidating the facts of a case. Frequently it is difficult to form an accurate or satisfactory opinion

upon matters in dispute from what appears in affidavits. The legislature no doubt understanding that, have here provided for the oral examination of the defendant. The obscurity which often surrounds the statements made on affidavit, the absence of direct assertion on certain points, the evasion of others, the suppression of facts which make against the deponent while those favorable are clearly brought out, and many other reasons which could be given from every day experience, prove that the interests of truth and justice are in most cases best subserved by an oral examination of a party. It is the experience no doubt of every Judge that truth can be best ascertained by the oral rather than by the written deposition of any person. The practical operation of this provision will probably bear further evidence of that fact. The Statute does not say how the order is to be obtained, nor whether it is necessary in all cases that there should be a formal application for it founded upon affidavit. In the absence of any authority that the writer can discover, he submits that the application may, if the Judge thinks it necessary, be granted on a formal application, but if the affidavits before him create such doubt in the mind of the Judge which he believed an oral examination of the defendant might remove, and that a clearer conception of the truth could be got by such examination, then he would have not only the power, but it would be the duty of the Judge instantly to grant an order for the examination on the material which he had before him : *Cockerell v. Van Diemen's Land Co.*, 16 C. B. p. 261. In either case the order for



examination of the defendant should be made and the examination thereunder should take place during the pendency of the application for judgment. Under this section, the object being to use the evidence thereon. It is submitted that on such examination the counsel or agents for both plaintiff and defendant should have an opportunity of being present and taking part in the examination if they so desired it: *Assessment Appeal*, 6 L. J. N. S. 295; and if that opportunity was not accorded them that the depositions should not be received or acted upon: *Lumley v. Gye*, 3 E. & B. 114; *Cunliffe v. Whitehead*, 3 Dowl. 684; *Sivewright v. Sivewright*, 8 P. R. 81.

The order might direct the examination to be taken before such person as the Judge thought fit. It should be conducted according to the principles of law, and if not, the depositions should, it is submitted, be suppressed in whole or in part: *Lumley v. Gye*, 3 E. & B. 114; *Taylor on Ev.*, 7th Ed., 451; *Arch. Pract.* 12th Ed., 334, 337.

The Judge may change the place of production of documents by altering the order: *Prestney v. Corporation of Colchester*, 24 Ch. D. 376.

The defendant would not be bound to make inquiries of his servants and others to aid the plaintiff on the examination: *Rasbotham v. Shropshire Union Rys. and Canal Co.*, 24 Ch. D. 110.

It is submitted that the plaintiff is entitled to an order for the examination of the defendant and the production of books, documents, &c., as well. The Statute says that the Judge may "order the defendant to attend and be examined upon oath,

or to produce any books or documents, or copies of or extracts therefrom." In Dwarris on Statutes by Potter it is said in the text at page 199 that the word "or" may frequently be read for the word "and" in the construction of a Statute, but the converse is not the case. The American Editor says:—"The word *or* in its ordinary signification corresponds to the word *and*." See Maxwell on Statutes 217; *McDonell v. Smith*, 17 U. C. R. 310; *McDonell v. VanKoughnet*, 17 U. C. R. 339; *Macdonell v. Macdonald*, 8 C. P. P. 479, 499.

Here the obvious construction is that the plaintiff having two remedies he may take either or both of them in the one proceeding: *Boag v. Lewis*, 1 U. C. R. 357; *Rob. v. Jos. Digest*, 1325 *et seq.*

Proceedings for examination could not be taken in the Division Court if the defendant resided beyond the jurisdiction: *Ontario Glass Co. v. Swartz*, 9 P. R. 252; *Gallagher v. Gairdner*, 2 Ch. Cham. 480; *Moffatt v. Prentice*, 6 P. R. 33; *Smith v. Babcock*, 9 P. R. 97; *Bank B. N. A. v. Eddy*, 9 P. R. 396.

The Statute does not make any provision in case of disobedience by the defendant of the order. In the High Court the defendant could be attached for contempt: *Haldane v. Eckford*, L. R. 7 Eq. 425; *Paterson v. Bowes*, 4 Grant 44; *Ross v. Robertson*, 2 Ch. Cham. 66; *The Merchants' Bank v. Pierson*, 8 P. R. 123; *Joy v. Hadley*, 22 Ch. D. 571; but in the Division Court the power to impose such punishment does not exist: *R. v. Lefroy*, L. R. 8 Q. B. 134; *Martin v. Bannister*, 4 Q. B. D. 491.

If the defendant should refuse to be examined  
o

or make production, the Judge would, it is submitted, be justified in presuming against the meritorious character of his defence to the action : *James v. Biou, and Owen v. Flack*, 2 Sim. & St. 606, 607 ; *Bell v. Frankis*, 4 M. & G. 446 ; *Curlew v. Corfield*, 1 Q. B. 814 ; *Clifton v. U. S. A.*, 4 Howard (Sup. Ct.) 242 ; *R. v. L. B. & S. C. Ry. Co.*, 20 L. J. M. C. 145 ; *Sutton v. Devonport*, 27 L. J. C. P. 54 ; *Atty.-Genl. v. Halliday*, 26 U. C. R. 397 ; *Lowell v. Todd*, 15 C. P. 306 ; *Hunter v. Lauder*, 8 L. J. N. S. 17 ; *Ockley v. Masson*, 6 App. R. 108.

It is submitted that an order should not be made on the mere suggestion of the plaintiff's belief that the defendant's books contain entries relating to the matters complained of : *Evans v. Louis*, L. R. 1 C. P. 656.

In *The Macgregor Laird*, L. R. 1 A. & E. 307, the Judge directed the documents to be produced for his own inspection before granting an order for inspection. The Judge remarked : " It would not be right for the Court to order documents to be produced of the contents of which it knows nothing."

A man in business would be presumed to keep books, which would be ordered to be produced more readily than documents : *Small v. Eccles*, 3 P. R. 189.

The Statute makes no provision for the examination of any officer of a defendant corporation.

A married woman would not be compelled to disclose the nature of her separate property under this section : *Standard Bank v. McGuargh*, 7 P. R. 350. She could, however, be examined and be

called on to produce the same as any other defendant. See notes to section 3, page 76 *ante*.

Sufficient notice of the examination and production should be given to the defendant: *Senn v. Hewitt*, 8 P. R. 70.

As to the production of books and accounts in support of claims in an administration suit, see *Re Ross Estate*, 5 App. R. 82.

*Irrelevant Questions*.—The defendant may object to answer questions put as to matters which are irrelevant to the matters in question in the action: *Girdlestone v. North B. M. Ins. Co.*, L. R. 11 Eq. 197; *Wier v. Tucker*, L. R. 14 Eq. 25; *Robson v. Crawley*, 2 H. & N. 766; *Rew v. Hutchins*, 10 C. B. N. S. 829.

The objection will not be allowed unless the irrelevancy is obvious: *Hoffmann v. Postill*, L. R. 4 Ch. 673; *McGarel v. Moon*, L. R. 10 Eq. 22; *Morris v. Bethell*, L. R. 4 C. P. 765; *Sutherland v. Sutherland*, 17 Beav. 209; *Chesterfield, &c., Co. v. Black*, W. N. 1876, 204; except in cases where the discovery might be used prejudicially to the party interrogated, when the Judge should look more closely into its relevancy: *Carver v. Pinto Leite*, L. R. 7 Ch. 90; *Moore v. Craven*, L. R. 7 Ch. 94 n.; *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. 33; *Mansfield v. Childerhouse*, 4 Ch. D. 82; *Smith v. Berg*, 36 L. T. N. S. 471.

Questions which are not put *bona fide* for the purposes of the action may be objected to. This objection, like that of irrelevancy, may be raised to interrogatories for the purpose of shaking a party's character or credit: *Allhusen v. Labouchere*, 3 Q. B. D. 654; *Baker v. Newton*, W. N. 1876, 8; *Baker*

v. *Lane*, 3 H. & C. 544; *Bickford v. Darcy*, L. R. 1 Ex. 354.

(u) PRODUCTION OF BOOKS, DOCUMENTS, ETC.

The same reasons which are given in the next preceding note for the examination of the defendant equally apply for ordering of the production of the defendant's books, or any documents that should be produced.

The principles applicable in the case of production of documents are the same as those with regard to discovery in answer to interrogatories, and whatever would have to be produced in the latter case or under order for production in the High Court will also, if it is submitted, have to be produced under this section: *Swinborne v. Nelson*, 16 Beav. 416; *Clegg v. Edmonson*, 22 Beav. 125.

The general rule in discovery is that a party is bound to disclose all the facts within his knowledge, and to produce all the documents in his possession or control, which are material to the case of his opponent, but not those entirely in support of his own case: *Wilson v. Thornbury*, L. R. 17 Eq. 517; *Smith v. Dowling*, 10 Jur. 63; *McHardy v. Hitchcock*, 11 Beav. 73; *Flight v. Robinson*, 8 Beav. 22, 33; *Bewicke v. Graham*, 7 Q. B. D. 400; *Bulman v. Young*, 49 L. T. N. S. 736; *Stovel v. Coles*, 4 Ch. Cham. 9; *Lawlor v. Murchison*, 3 Grant 553; *Alexander v. Diamond*, 9 P. R. 274. This the defendant would also be bound to do under this section. To this general rule there are, however, some well recognized exceptions.

A "document" is "a writing or paper, containing

some information, evidence or directions": Worcester 432.

*Privileged Communications.*—Communications relating to the matter in question between a party and his solicitor or counsel, made confidentially and in their professional capacity, are privileged: *Thomas v. Rawlings*, 27 Beav. 140; *Hamelyn v. Whyte*, 6 P. R. 143; *Beadon v. King*, 17 Sim. 34; *Smith v. Daniell*, L. R. 18 Eq. 649; *Bullock v. Corry*, 3 Q. B. D. 356; whether made personally, as appeared in *Greenough v. Gaskell*, 1 My. & K. 98, and *Pearse v. Pearse*, 1 DeG. & S. 12, or through an agent employed by the solicitor: *Steele v. Stewart*, 13 Sim. 533; *Lafone v. Falkland Island Co.*, 4 K. & J. 34; *Simpson v. Brown*, 33 Beav. 482; or an agent employed by the client for the purpose of conveying information to his solicitor: *Reid v. Langlois*, 1 Mac. & Gord. 627, 636; *Bunbury v. Bunbury*, 2 Beav. 173; *Carpmael v. Powis*, 9 Beav. 16; *Hooper v. Gumm*, 2 J. & H. 602; *McFarlan v. Rolt*, L. R. 14 Eq. 580.

Communications between a solicitor and his agent are also privileged: *Hampson v. Hampson*, 26 L. J. Ch. 612; *Hughes v. Biddulph*, 4 Russ. 190; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; *Lyell v. Kennedy*, 9 App. Cas. 81; *Bustros v. White*, 1 Q. B. D. 423; *Bacon v. Bacon*, 34 L. T. N. S. 349.

The privilege exists, though no litigation existed or was contemplated at the time they were made: *Macfarlan v. Rolt*, L. R. 14 Eq. 580; *Carpmael v. Powis*, 9 Beav. 16; *Minet v. Morgan*, L. R. 8 Ch. 361; *Wilson v. Northampton Ry. Co.*, L. R. 14 Eq. 477; *Turton v. Barber*, L. R. 17 Eq. 329; *Mostyn v. West*

*Mostyn Coal Co.*, 34 L. T. N. S. 531. But see *In re Mason*, *Mason v. Cattley*, 22 Ch. D. 609.

Communications made by a non-professional agent in answer to inquiries made by a party's own solicitor: *Curling v. Perring*, 2 Myl. & K. 380; or his agent in answer to inquiries made by a party himself, at the instance or request of his solicitor: *Friend v. L. C. & D. Ry. Co.*, 2 Ex. D. 437; *The Guelph C. Co. v. Whitehead*, 9 P. R. 509; *Star Kidne Pad Co. v. Greenwood*, 3 Ont. R. 280; or reports of doctors as to injuries by railway accident: *Pacey v. London Tramways Co.*, 2 Ex. D. 440, relating to the matter in question for the purposes of anticipated or existing litigation, but not otherwise: *Paddon v. Winch*, L. R. 9 Eq. 666; are also privileged: *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; *Skinner v. G. N. Ry. Co.*, L. R. 9 Ex. 298; *Malden v. G. N. Ry. Co.*, L. R. 9 Ex. 300; *Bustros v. White*, 1 Q. B. D. 423; *Cossey v. L. B. & S. Coast Ry. Co.*, L. R. 5 C. P. 146; *McCorquodale v. Bell*, 1 C. P. D. 471; see also *Woolley v. N. L. Ry. Co.*, L. R. 4 C. P. 602.

The privilege exists in any subsequent as well as in any anticipated or existing litigation: *Bullock v. Corry*, 3 Q. B. D. 356; *Hughes v. Garnons*, 6 Beav. 352; *Toronto Gravel Road Co. v. Taylor*, 6 P. R. 227.

Communications from a non-professional agent, obtained for the purpose of being submitted to a solicitor or counsel for his advice: *Southwark Water Co. v. Quick*, 3 Q. B. D. 315; *The Theodor Korner*, 3 P. D. 162; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; *Fenner v. L. & S. E. Ry. Co.*, L. R. 7 Q. B. 767; or from an agent employed

by the party or his solicitor for the purpose of the action, or of getting up evidence for the trial: *The Theodor Korner*, 3 P. D. 162; *Walsham v. Stainton*, 2 H. & M. 1; *Friend v. L. C. & D. Ry. Co.*, 2 Ex. D. 437; *Martin v. Butchard*, 36 L. T. N. S. 732; even though the documents are not actually submitted to his legal adviser: *Southwark Water Co. v. Quick*, 3 Q. B. D. 315; are all privileged.

But communications other than those above mentioned between a party and his *non-professional* agent though made with a view to and in contemplation of litigation and though made after the litigation has actually commenced are not privileged: *Bustros v. White*, 1 Q. B. D. 423; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644; *Wiman v. Bradstreet*, 2 Ch. Cham. 77; *Martin v. Butchard*, 36 L. T. N. S. 732; *Baker v. L. & S. W. Ry. Co.*, L. R. 3 Q. B. 91; *English v. Tottie*, 1 Q. B. D. 141; *Kerr v. Gillespie*, 7 Beav. 572; *Smith v. Daniell*, L. R. 18 Eq. 649; *Mahony v. N. W. L. Ass. Fund*, L. R. 6 C. P. 252.

Letters written by third parties to a party's solicitor expressed to be "in confidence" and under a pledge not to disclose their contents to any one but the party and his legal advisers are not privileged: *McCorquodale v. Bell*, 1 C. P. D. 471.

Communications between co-defendants are not privileged; *Hamilton v. Nott*, L. R. 16 Eq. 112; *Betts v. Menzies*, 26 L. J. Ch. 528; *Goodall v. Little*, 1 Sim. N. S. 155, unless one defendant is acting as agent for their solicitor, or they are made with the express direction to forward them to their joint



solicitor: *Jenkyns v. Bushby*, L. R. 2 Eq. 547.

Instructions to counsel, drafts of pleadings, briefs and observations, and notes of counsel thereon, except so far as they consist of public matters, such as the endorsement of the order of the Court: *Walsham v. Stainton*, 2 H. & M. 1; *Nicholl v. Jones*, 2 H. & M. 588, are privileged: *Nias v. N. & E. Ry. Co.*, 3 Myl. & Cr. 355; *Pearse v. Pearse*, 1 DeG. & Sim. 12; *Bunbury v. Bunbury*, 2 Beav. 173; *Wynn v. Humberston*, 27 Beav. 421; *Mostyn v. West Mostyn Coal Co.*, 34 L. T. N. S. 531. Cases submitted to counsel before litigation and documents accompanying them and counsel's opinion thereon are privileged from production: *Bolton v. Cor. of Liverpool*, 1 M. & K. 88; *Manser v. Dix*, 1 K. & J. 451; *Mayor of Bristol v. Cox*, 26 Ch. D. 678; *Reece v. Trye*, 9 Beav. 316; *Brown v. Oakshott*, 12 Beav. 252; *Jenkyns v. Bushby*, L. R. 2 Eq. 547 and this privilege extends to subsequent litigation involving the same question: *Holmes v. Baddeley*, 1 Phil. 476.

Short-hand notes of evidence in a previous action are privileged: *Nordon v. Defries*, 8 Q. B. D. 508.

Communications between a party and his medical examiner or clergyman are not privileged; "Our law" says Sir George Jessel, M. R., in *Anderson v. Bank of British Columbia*, 2 Ch. D., at pages 650 and 651, "has not extended that privilege, as some foreign laws have, to the medical profession or to the sacerdotal profession. We know that in some foreign countries communications made to a medical man are privileged, upon the ground that it is desirable that a man shall be perfectly free in his communication with his medical man as that

he shall be free in his communications with his lawyer. That has not been recognized in this country. Again, in foreign countries where the Roman Catholic faith prevails, it is considered that the same principles ought to be extended to the confessional, and that it is desirable that a man should not be hampered in going to confession by the thought that either he or his priest may be compelled to disclose in a Court of Justice the substance of what passed in such communication. This, again, whether it is rational or irrational, is not recognized by our law": Taylor on Ev., sections 837, 838.

The privilege from discovery resulting from professional confidence does not extend to facts communicated by the solicitor to the client which cannot be the subject of a confidential communication between them, even though such facts have a relation to the client in the action: *Foakes v. Webb*, 28 Ch. D. 287.

Even nominal plaintiffs have been held liable to production of documents: *Wilson v. Raffalovich*, 7 Q. B. D. 553.

Copies of unprivileged documents are themselves unprivileged: *Lyell v. Kennedy*, 27 Ch. D. 1. See also *Land Corporation v. Puleston*, W. N. 1884, 1.

*Title Deeds.*—A defendant would not under this section be compelled to produce muniments of title which he swore were evidence of or related to his own title only, and did not bear evidence of or tend to make out title for the plaintiff or any link of it: *Owen v. Wynn*, 9 Ch. D. 29; *Kettlewell v. Barstow*, L. R. 7 Ch. 686; *New British M. Invest.*

*Co. v. Peed*, 3 C. P. D. 196; *Stovel v. Coles*, 4 Ch. Cham. 9; but documents relating to the case of both parties must be produced: *Smith v. Duke of Beaufort*, 1 Hare 507, 522; *Burrell v. Nicholson*, 1 Myl. & K. 680; *Hunt v. Elmes*, 27 Beav. 62; *Gandee v. Stansfield*, 4 DeG. & J. 1; *Hamilton v. Street*, 1 Grant 327; *Saunders v. Furnivall*, 2 Ch. Cham. 49.

Parties are never compelled to produce their title deeds, even though the action be not for the recovery of the possession of land: *Pickering v. Noyes*, 1 B. & C. 262; *Doe v. Date*, 3 Q. B. 609; *Egremont v. Egremont*, 14 Ch. D. 158; or any document which they hold as mortgagee or pledgee: *Doe v. Ross*, 7 M. & W. 102, 122; *Hope v. Liddell*, 7 DeG. M. & G. 338; *Hastings v. Ivall*, L. R. 8 Ch. 1017.

An official liquidator is bound to produce documents which an adverse litigant requires to see: *In re Mutual Society*, 22 Ch. D. 714; *In re Contract Corporation*, *Gooch's Case*, L. R. 7 Ch. 207; *In re Barned's Banking Co.*, L. R. 2 Ch. 350; *L. & Y. Bank v. Cooper*, W. N. 1885, 114.

In a petition of right suit the Crown is entitled to production of documents: *Tomline v. The Queen*, 4 Ex. D. 252.

Where a plaintiff admitted he had certain documents in possession, production was ordered: *Howcutt v. Rees*, 2 Grant 268; *Green v. Amey*, 2 Ch. Cham. 138.

Production will not be ordered where it would be immaterial: *Merchants Bank v. Tisdale*, 6 P. R. 51.

*Tendency to Criminate or Expose to Penalty or*

*Forfeiture*.—The defendant could not be compelled to produce any book or document which might contribute to establish a criminal charge against him, or expose him to a penalty or forfeiture: *Whitaker v. Izod*, 2 Taunt. 115; *Lee v. Read*, 5 Beav. 381; *U. S. of America v. McRae*, L. R. 3 Ch. 79; *Hill v. Campbell*, L. R. 10 C. P. 222; *Waters v. Earl of Shaftsbury*, 14 W. R. 259; *Howe v. McKernan*, 30 Beav. 547; *Bullock v. Richardson*, 11 Ves. 373; *Robinson v. Kitchen*, 8 DeG. M. & G. 88.

The defendant must swear that to the best of his belief the production would tend to criminate him: *Webb v. East*, 5 Ex. D. 23, 108.

He can claim his privilege at any stage of the inquiry: Taylor on Ev., section 1319; *R. v. Garbett*, 1 Den. C. C. 236; *King of the Two Sicilies v. Willcox*, 1 Sim. N. S. 301, 320.

But if a document relied on by the defendant is alleged to be a forgery, that is no reason for its non-production: *Thomas v. Dunn*, 6 M. & G. 274; *Woolmer v. Devereux*, 2 M. & G. 759.

It is doubtful if a defendant is required to produce a document required only for comparison of handwriting: *Wilson v. Thornbury*, L. R. 17 Eq. 517.

A solicitor cannot set up a lien acquired in a cause as against the right of other parties in the cause to production: *Vale v. Oppert*, L. R. 10 Ch. 340.

Where the documents asked for shew the right of the defendant only, production will not be ordered: *Roberts v. Oppenheim*, 26 Ch. D. 724; *Stovel v. Coles*, 4 Ch. Cham. 9.

*Possession of Documents.*—A defendant cannot be compelled to produce a document which is not in his exclusive possession : *Walker v. Wildman*, 6 Madd. 47 ; *Fraser v. Burrows*, 2 Q. B. D. 624, or in that of his agent : *Murray v. Walter*, 1 Cr. & Ph. 114, but is only in his possession jointly with another : *Hadley v. McDougall*, L. R. 7 Ch. 312 ; *Kearsley v. Philips*, 10 Q. B. D. 36, 465 ; *Fraser v. Home Ins. Co.*, 6 P. R. 45, or as partners : *Reid v. Langlois*, 1 M. & Gord. 627, 636 ; *Robertson v. Shewell*, 15 Beav. 277 ; but see *Plant v. Kendrick*, L. R. 10 C. P. 692 ; or executors of a deceased person : *Morrell v. Wootten*, 13 Beav. 105 ; or in possession of an agent on behalf of himself and another : *Lopez v. Deacon*, 6 Beav. 254 ; *Edmonds v. Lord Foley*, 30 Beav. 282 ; who is not a party to the action and who does not consent : *Hutchinson v. Glover*, 1 Q. B. D. p. 140 ; but the defendant should clearly shew the joint possession : *Lazarus v. Mozley*, 5 Jur. N. S. 1119 ; *Bovill v. Cowen*, L. R. 5 Ch. 495.

The mere fact that a third person, not a party to the action, is interested in a document is no ground for refusing to produce it : *Kettlewell v. Barstow*, L. R. 7 Ch. 686 ; *Plant v. Kendrick*, L. R. 10 C. P. 692.

A party therefore cannot refuse to produce private and confidential letters from a stranger on the ground that the writer forbids their production. The party requiring the production, however, will be put to an undertaking not to use them for any collateral purpose : *Hopkinson v. Lord Burghley*, L. R. 2 Ch. 447 ; *Richardson v. Hastings*, 7 Beav. 354 ; *Williams v. Prince of Wales &c, Co.*, 23 Beav. 338.

As to the production of a compromise of a former action, see *Hutchinson v. Glover*, 1 Q. B. D. 138; *Warrick v. Queen's College, Oxford*, L. R. 4 Eq. 254.

The mere fact that a document would not be evidence will not exempt it from production: *Nicholl v. Jones*, 2 H. & M. p. 593; *Bustros v. White*, 1 Q. B. D. p. 425; *Hutchinson v. Glover*, 1 Q. B. D. p. 141.

Any objection to production of any document should be distinctly raised and clearly stated in the deposition: See *Gardner v. Irvin*, 4 Ex. D. 49; *Nicholl v. Elliott*, 3 Grant 536; *Fraser v. Home Ins. Co.*, 6 P. R. 45; *Wright v. Western Ins. Co.*, 2 Ch. Cham. 403; *Church v. Perry*, 36 L. T. N. S. 513; *Smith v. Berg*, 36 L. T. N. S. 471; *Lavery v. Wolfe*, 10 P. R. 488; *Lockwood v. Bew*, 10 P. R. 655.

A mortgagee is always bound to produce the mortgage deed for the inspection of the mortgagor: *Patch v. Ward*, L. R. 1 Eq. 436. See also *Smith v. Barnes*, L. R. 1 Eq. 65; *West of England and S. Wales D. Bank v. Canton Ins. Co.*, 2 Ex. D. 472; *Emmens v. Middlemiss*, 8 P. R. 320; but see *Bell v. Chamberlen*, 3 Ch. Cham. 429.

Title deeds in the possession of another Court cannot be produced by defendant: *Vivian v. Little*, 11 Q. B. D. 370.

As to the production of books in actual use, see *Hamelyn v. Whyte*, 6 P. R. 143. See also *The Western of Canada Oil Co. v. Walker*, 6 P. R. 191; *McDonell v. McKay*, 2 Ch. Cham. 141, as to the production of books.

In *Brown v. Capron*, 6 P. R. 203, it was held that a *feme covert* plaintiff, whose husband was a defend-

ant, was not bound to procure production of documents by the husband for the benefit of his co-defendants.

Although a plaintiff may be entitled to call for the production of documents, it does not follow that the contents of such documents are in themselves evidence: *The Canada C. Ry. Co. v. McLaren*, 8 App. R. 564.

This provision as to production is quite independent of that contained in the 137th Rule, which was evidently framed in the interest of defendants only: *Sinclair's D. C. Act*, 269.

*Costs.*—No provision is made in the Statute for the payment of the travelling fees or expenses of the defendant in attending to be examined. Although the Statute is silent on the subject, it would not seem fair to compel the defendant to attend at his own expense. Probably the Judge would in the order impose pre-payment of conduct money as a condition of defendant's attendance. See Form of Order, *post*.

It is submitted that a fair rule in regard to the costs of the application for examination and production, and consequent thereon, would be that if after such examination and production are had, the plaintiff is held entitled to an order for immediate judgment, they should be made costs in the cause, but, if not, they should be costs in the cause to the defendant in any event. See *Republic of Peru v. Weguelin*, L. R. 7, C. P. 352. As the costs in any case must be trifling, probably they will usually be made costs in the cause.

In addition to the cases cited at page 93 of this

**Judge.**



## ORDER FOR LEAVE TO DEFEND UNCONDITIONALLY.

In the Division Court for the County of .

[*Name of the Judge*] in Chambers.

BETWEEN A. B., Plaintiff,

and

C. D., Defendant.

Upon hearing and upon reading the  
affidavit of filed, and :It is ordered that the defendant be at liberty to  
defend this action unconditionally, and that the  
costs of this application be .Dated the day of 188 .  
Judge.ORDER FOR LEAVE TO DEFEND ON PAYMENT  
INTO COURT.

In the Division Court for the County of .

[*Name of the Judge*] in Chambers.

Between A. B., Plaintiff.

and

C. D., Defendant.

Upon hearing , and upon reading the  
affidavit of , filed and :It is ordered that if the defendant pay into Court  
within days from the date of this order the  
sum of \$ , he be at liberty to defend this action,  
but if that sum be not so paid, the plaintiff be at  
liberty to have the Clerk of this Court, which the  
Clerk is hereby empowered to do, enter final judg-  
ment for the amount of the plaintiff's debt or money  
demand sought to be recovered in this action, as

appears by the particulars of claim or demand endorsed on (*or attached to*) the special summons herein, with interest, if any, and costs, and that in either event the costs of this application be

Dated the                      day of                      188 .

Judge.

ORDER FOR LEAVE TO DEFEND AS TO PART ON  
PAYMENT INTO COURT AND AS TO RESIDUE  
UNCONDITIONALLY.

In the                      Division Court for the County of .

[*Name of the Judge*] in Chambers.

BETWEEN A. B., Plaintiff.

and

C. D., Defendant.

Upon hearing                      , and upon reading the  
affidavit of                      filed, and

It is ordered, that if the defendant pay into Court  
within                      days from the date of this order the  
sum of \$                      he be at liberty to defend this action  
as to the whole of the plaintiff's claim in this cause,  
and it is ordered, that if that sum be not so paid  
the plaintiff be at liberty to have the Clerk of  
this Court forthwith enter judgment for that sum,  
which the said Clerk is hereby empowered to do,  
and the defendant be at liberty to defend this  
action as to the residue of the plaintiff's claim;  
and it is ordered that the costs of this application  
be

Dated the                      day of                      188 .

Judge.

## ORDER FOR THE DEFENDANT'S EXAMINATION AND PRODUCTION OF BOOKS, &C.

In the                      Division Court for the County of                      .

[*Name of the Judge*] in Chambers.

**BETWEEN A. B., Plaintiff.**

and

**C. D., Defendant.**

Upon hearing \_\_\_\_\_, and upon reading the  
affidavit of \_\_\_\_\_ filed, and \_\_\_\_\_.

It is ordered that the defendant do [upon payment of proper charges for conduct money] attend before the Judge of this Court, at his Chambers in the Court House, in the            of            on the            day of            instant, at ten of the clock in the forenoon of the same day, or at such time as Chambers may first thereafter be held, and be examined upon oath, and there and then produce any books or documents, or copies of or extracts therefrom, pursuant to the sixth section of the Division Courts Amendment Act, 1885, and particularly the following : [*here describe them shortly.*]

Dated the       day of       188

**Judge.**

[Should the order be for the examination and production before some one else, the above form can easily be changed.]

R. S. O., c.  
47, s. 114 re-  
pealed.

5. Section 114 of The Division Courts Act is hereby repealed and the following substituted therefor:—

Summon-  
ing jurors.

114. For the trial of all actions required (*x*) to be tried by or before a jury at any session of a Division Court the clerk of such Court shall cause not less than twelve (*y*) of the persons liable to serve as jurors to be summoned to attend at such session at the time and place to be mentioned in the summons, and such summons shall be served at least three days before the Court, either personally, or by leaving the same with a grown up person at the residence of the juror.

(*x*) WHEN JURY REQUIRED.

The Judge has to try all actions in the Division Court himself, except in cases where either party having the right, requires a jury to be summoned

under the 110th section of the Division Courts Act, or where he may choose to call a jury from the body of the Court under the provisions of section 122 of that Act.

The right of either party to a jury existed from the establishment of the Division Court system in the year 1850 until the Division Courts Act, 1880, in cases of tort, where the amount sought to be recovered exceeded \$10, and in all other actions where such amount exceeded \$20: Sinclair's D. C. Act, 141.

By the 43rd section of the Division Courts Act 1880, the 109th section of the Division Courts Act was repealed and new provision made instead. Later Statutes have also extended the right to a jury and which now exists in the following cases:

(1.) In actions of tort, where the sum sought to be recovered exceeds \$20: D. C. Act, 1880, section 43.

(2.) In actions of replevin where the value of the goods sought to be recovered exceeds \$20: D. C. Act, 1880, section 43.

(3.) In all other actions where the amount sought to be recovered exceeds \$30.00: D. C. Act, 1880, section 43.

(4.) In any interpleader issue, no matter what the value of the goods in dispute or the amount of their proceeds may be: Sinclair's D. C. Law, 1884, 57.

In interpleader issues either party can have a jury summoned by giving to the Clerk or leaving at his office notice in writing requiring a jury within five days after the day of service of the summons on him: Sinclair's D. C. Law, 1884, 57.

The notice to the Clerk for a jury *must* be in writing.

Where a party has complied with the terms necessary to entitle him to a jury, the Judge has not power to try the issue without a jury: *Hamlyn v. Betteley* 6 Q. B. D. 63; nor enter up judgment in opposition to their finding: *Perkins v. Dangerfield*, W. N. 1879, 172; *Jardine v. Smith*, 8 W. R. 464.

It is imperative on the Judge in such case to try the cause with a jury: *Powell v. Williams*, 12 Ch. D. 234; Sinclair's D. C. Act, 1880, 69 and 70, and Sinclair's D. C. Law, 1884, 63.

If a Judge after hearing the evidence of the plaintiff and part of the evidence for the defence thinks proper to discharge the jury and enter a non-suit his decision could not be questioned, according to the authority of *Kershaw v. Chantler*, 26 L. T. N. S. 474.

(y) NUMBER OF JURORS TO BE SUMMONED.

It will be observed that the 112th section of the Division Courts Act is amended by the 44th section of the Division Courts Act, 1880, so that Clerks in selecting the persons to be summoned must observe the requirements of both sections of these Acts. It was a question formerly whether twelve jurors were not required to be summoned in *each* case. D. C. Act, section 114, as amended by the D. C. Act 1880, section 48. There was no necessity for incurring such expense or occasioning much inconvenience to the parties summoned. Under this Act the number of persons to be summoned as jurors "at any session" is not to be less than

twelve. This the Legislature thought would be ample, and now since jurors receive some reasonable compensation for their time and trouble (Sinclair's D. C. Act, 1880, pages 71 and 72), thereby causing a fuller attendance of the persons summoned, there is no doubt that the views of the law-makers will be found correct.

The summons must be issued "at least three days before the Court." This means *clear* days, excluding the day of service and the day of Court, but inclusive of Sunday. Sinclair's D. C. Act, 1880, 19, 46. *McLean v. Pinkerton*, 7 App. R. 490. See note (s) to section 4 of this Act, at page 103 *ante*. As to service of the jury summons, how and upon whom made, see Sinclair's D. C. Act, 143 (*m*).

#### RIGHT OF CHALLENGE.

In the absence of Statutory enactment the right to challenge jurors *peremptorily* and without cause does not exist in civil actions : *Creed v. Fisher*, 9 Ex. 472.

The 115th section of the Division Courts Act preserves to all parties their right of lawful challenge. The law formerly was that each party had the right to challenge *three* persons *peremptorily* who were called as jurors. Sinclair's D. C. Act, 144.

The Jury Act of 46 Victoria (Ontario), chapter 7, section 111 extends the right of *peremptory* challenge to "any *four* of the jurors drawn to serve on the trial of the cause."

For further reference to the right of challenge the reader is referred to Sinclair's D. C. Act, 144.

Certain persons are "freed and exempted" from serving as jurors "in any Court;" 46 Victoria, (Ontario), chapter 7, section 6, and they will be found enumerated in that and the following section.

The 49th section of the Division Courts Act, 1880, makes provision that in the event of the panel being exhausted before a jury shall be obtained the Judge can direct the Clerk to summon from the body of the Court a sufficient number of disinterested persons to make a full jury, and any person so summoned may, saving all lawful exceptions and rights of challenge, sit and act as a juror as fully as though he had been regularly summoned.



R.S.O. c. 47,  
s. 210, sub-s.  
3 repealed.

6. Sub-section 3 of section 210 of The Division Courts Act is hereby repealed, (*z*) and the following substituted therefor:—

County  
Judge to  
adjudicate  
on certain  
claims on  
amount of  
goods  
seized in  
execution.

(3) The County Judge having jurisdiction (*a*) in such Division Court shall adjudicate (*b*) upon the claim, and make such order (*c*) between the parties in respect thereof, and of the costs (*d*) of the proceedings, as to him seems fit; and shall also adjudicate between such parties, or either of them, and such officer or bailiff in respect of any damage or claim of or to damages (*e*) arising or capable of arising out of the execution of such process by such officer or bailiff, and make such order in respect thereof, and of the costs of any proceedings as to the Judge shall seem fit; and any

such order shall be enforced in like manner as an order made in any suit brought in such Division Court, and shall be final and conclusive between the parties, except that upon the application of either the attaching or execution creditor or the claimant, or the officer or bailiff, within fourteen days after the trial, the Judge may grant a new trial (*f*) upon good grounds shewn, as in other cases under this Act, upon such terms (*g*) as he thinks reasonable, and may in the meantime stay proceedings.

(2) It will be observed that the 3rd sub-section of section 210 of the Division Courts Act is repealed by this section, and further provision for the more complete disposal of interpleader matters is hereby made. The repealed sub-section was in these words :

"The County Judge having jurisdiction in such Division Court shall adjudicate upon the claim, and make such order between the parties in respect thereof, and of the costs of the proceedings as to him seems fit ; and such order shall be enforced in

like manner as an order made in any suit brought in such Division Court, and shall be final and conclusive between the parties, except that upon the application of either the attaching or execution creditor or the claimant within fourteen days after the trial, the Judge may grant a new trial upon good grounds shewn, as in other cases under this Act, upon such terms as he thinks reasonable, and may in the meantime stay proceedings."

(a) JUDGE HAVING JURISDICTION..

Any Judge or Junior Judge of the County, or any Deputy Judge appointed under chapter 42, section 6, of the Revised Statutes of Ontario, or the Judge of the County Court of any other County, duly requested so to do, or acting in pursuance of R. S. O., chapter 42, sections 16, 22, or any Deputy Judge appointed by the Judge under the 20th section of the Division Courts Act, would have "jurisdiction in such Division Court" under this section. Where a Deputy Judge is appointed by Government the law presumes that the necessary facts exist to warrant such appointment, and on the party disputing the validity of the appointment rests the *onus* of establishing its invalidity.

In *R. v. Fee*, 3 Ont. R. 107, it was held that where a commission was issued by the Governor-General in Council appointing a barrister a Deputy Judge during pleasure and the absence of the County Judge under leave of absence granted to him by Order in Council, it was not necessary to prove the Order in Council granting such leave of

absence, and that the general presumption of law should prevail, namely, that a person acting in a public capacity was properly appointed and duly authorized to act until the contrary was shewn by the person disputing it. It was also held in that case that it was not essential that the County Judge should be absent from the County in order to enable the Deputy Judge to act.

The Junior Judge has the same power to appoint a barrister as Deputy Judge to hold a Division Court sittings as the Judge has, and all the powers of the Junior Judge would continue until the Deputy Judge had performed the purpose of his appointment: *In re Leibes v. Ward*, 45 U. C. R. 375.

In the case of *In re Wilson v. McGuire*, 2 Ont. R. 118, it was contended that the Provincial Legislature could not authorize the Judge of one County to hold a Division Court in another County. This contention was not sustained, but in *Gibson v. McDonald*, 7 Ont. R. 401, it was held that a Judge of one County could not preside at the Court of General Sessions of any County but his own. For further remarks on the subject generally, see Sinclair's D. C. Act, pages 18 and 19.

(b) MUST ADJUDICATE.

The language of the repealed section and this declares an imperative duty, and the Judge has no alternative but to adjudicate on the questions which are properly presented to him in the interpleader issue. Whether in all cases the adjudication here mentioned must be by the Judge alone, or whether the provisions of 47 Victoria, Chapter

10, section 10 (Sinclair's Division Court Law, 1884, 57 *et seq.*) can be invoked will be discussed hereafter. The adjudication here mentioned is simply the judicial determination of some question or questions in dispute between the parties to the interpleader issue. In order to bind parties there must be *an adjudication* on the interpleader summons, and anything short of that will not satisfy the Statute: *Brunsdon v. Humphrey*, 14 Q. B. D. 141. The question in dispute must have become *res judicata* so as to be obligatory on all parties concerned: *Challiner v. Burgess*, 2 U. C. L. J. 137; but no particular form of words is necessary: *Oliphant v. Leslie*, 24 U. C. R. 398; *Hunter v. Vanstone*, 7 App. R. 750.

Unless a new trial is moved for as prescribed by this section, the decision of the Judge is final and conclusive as to the goods or the proceeds thereof, *R. v. Doty*, 13 U. C. R. 398; *Keane v. Stedman*, 10 C. P. 435; *Williams v. Richardson*, 36 L. T. N. S. 505; *Turner v. Bridgett*, 9 Q. B. D. 55.

The Judge could not reverse, change or alter his decision after the time had elapsed: *Mossop v. Great Northern Railway Co.*, 16 C. B. 580, S. C. 17 C. B. 130; *Irving v. Askew*, L. R. 5 Q. B. 208, 211; *Death v. Harrison*, L. R. 6 Ex. 15; *Dodds v. Shepherd*, 1 Ex. D. 75.

Should the Bailiff return the execution without the order of the Judge there could not be an interpleader issue or a proper adjudication: *Merchants Bank v. Herson*, 10 P. R. 117; *Angell v. Baddeley*, 3 Ex. D. 49.

On the subject of interpleader generally in Divi-

sion Courts, see Sinclair's D. C. Act, 214. As to what is considered "the proceeds or value" of goods for the purposes of interpleader, see Sinclair's D. C. Law, 1884, 47; *Smith v. Critchfield*, 14 Q. B. D. 873.

Where a Bailiff sells goods with the consent of both parties he does not thereby exercise his discretion so as to deprive him of the right to interplead: *Darling v. Collatton*, 10 P. R. 110, nor would such a right be defeated by receiving from the claimant the amount due on the execution in cash, and withdrawing from the seizure of the goods: *Paris Manufacturing Co. v. Walls*, 10 P. R. 138.

If the Bailiff should, after notice of claim, pay over to the execution creditor the amount of his execution, he would not be entitled to interpleader: *Adams v. Blackwell*, 10 P. R. 168.

The Division Courts Act does not apply to property *intended* to be taken. Sinclair's D. C. Act, 214 (*y*); see also *Ogden v. Craig*, 20 L. J. N. S. 367; *Brown v. Nelson*, 20 L. J. N. S. 390.

As to the course to be pursued by an officer where a claim is made to goods seized, the reader is referred to *Cinqmars v. Moodie*, 15 U. C. R. p. 606; *Walker v. Niles*, 3 Ch. Cham. 59; Sinclair's D. C. Law, 1884, 58 *et seq.*

Where the claimant fails the Bailiff's costs are to be allowed to him out of the amount levied unless otherwise ordered. Rule 40.

If the Bailiff does not retain his costs out of the amount levied, he cannot, if the claimant has been

ordered to pay the costs, sue the execution creditor for them : *Bloor v. Huston*, 15 C. B. 266.

It frequently becomes a question with a Bailiff whether he is bound to interplead unless the amount is prepaid, or security is given to him for the costs which he must necessarily incur by interpleading. No provision has apparently been made for such a case. We think if he desires to protect himself he should interplead under any circumstances, but surely some provision should be made for such a case.

Where a foreigner is claimant. : see Sinclair's D. C. Law, 1884, p. 60.

Where one party gives a bond of indemnity, or does any act which would otherwise prejudice a Bailiff's right to interpleader, he cannot set up his own act to the prejudice of the Bailiff's right : *Thompson v. Wright*, 13 Q. B. D. 632.

As to the issue to be tried, and what is necessary for the claimant to show to sustain his claim, and the right of apportionment of costs, see Sinclair's D. C. Law, 1884, 60, 61.

Execution creditors in the Division Court should be made parties to interpleader proceedings in the High Court : *Macfie v. Hunter*, 9 P. R. 149.

The Judge could not adjudicate upon any question of costs except the costs of the proceedings mentioned in the Statute : *Hansen v. Maddox*, 12 Q. B. D. 100.

Equitable as well as legal rights are the subject of adjudication in an interpleader issue, and must be recognized by the Court : *Duncan v. Cashin*, L. R. 10 C. P. 554 ; *Engelback v. Nixon*, L. R. 10 C. P.

645; *Rusden v. Pope*, L. R. 3 Ex. 269; *Bank of Ireland v. Perry*, L. R. 7 Ex. 14; *McIntosh v. McIntosh*, 18 Grant 58; *Wilson v. Dundas*, W. N. 1875, 232; *Leaming v. Woon*, 7 App. R. 42.

The issue of the interpleader summons does not remove the case from the control of the Court: *Wicks v. Wood*, 26 W. R. 680.

Neither an interpleader issue nor any other case can be adjourned by consent of parties without the consent of the Judge: *Morgan v. Rees*, 6 Q. B. D. 508.

An action of trespass can be brought pending an interpleader issue. In *Hooke v. Ind, Coope & Co.*, 36 L. T. N. S. 467, Denman, J., says: "I think it cannot be laid down that a writ cannot be issued pending the trial of an interpleader issue." The circumstances might, however, warrant a stay of proceedings.

Where more goods are seized than claimed, the claimant must in his particulars of claim, under Rule 38 or otherwise, specify the particular goods which he claims: *Price v. Plummer*, 25 W. R. 45; *Plummer v. Price*, 39 L. T. N. S. 657.

A *cestui que trust* who is in possession of settled goods by virtue of an authority from the trustees, is entitled to the same as against the Sheriff or Bailiff seizing them for the execution creditor of a debtor living in the house wherein such goods are, and it is not necessary for the trustees to be parties to an interpleader issue directed in order to determine the right of possession: *Sanderson v. Perrin*, 22 L. T. N. S. 419.

The High Court of Justice has no power to order



a Judge of the Division Court to re-enter a cause on his list for re-trial: *Morgan v. Rees*, 29 W. R. 213.

There is power to adjudicate as to damages, even if the goods have been sold by the Bailiff: *Hills v. Renny*, 5 Ex. D. 313.

Where a party to an interpleader issue is entitled to have it tried by a jury, the Judge cannot prevent that right: *Hamlyn v. Betteley*, 6 Q. B. D. 63. He could preserve his right by simply protesting. Lord Selborne, L. C., says at page 65 of that report: "Where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the whole case subject to the protest he has made."

There could not be a trial by special jury in the Division Court: 46 Vict., chapter 7, ss. 109-130; *Ex parte Armitage, In re Learoyd, Wilton & Co.*, 17 Ch. D. 13.

Where on a claim being made to goods seized by a Bailiff the execution creditor does not direct the Bailiff to give up the goods to the claimant, but appears and contests his title in interpleader proceedings, it was held no evidence of a ratification by the execution creditor of the Bailiff's detention: *Toppin v. Tuckerfield*, 1 C. & E. 157.

Should the Bailiff, with the consent of the execution creditor and the claimant, temporarily withdraw from possession of the goods or chattels, they would no longer be in the custody of the law, and a landlord could distrain upon them for rent, although he knew that the interpleader proceedings were

pending: *Cropper v. Warner*, 1 C. & E. 152; see *Craig v. Craig*, 7 P. R. 209.

It would seem, though doubted in *Poyser v. Minors*, 7 Q. B. D. 329, that by Order XVI., rule 17 of the English County Court Orders, 1875, a judgment of non-suit in an English County Court has the same effect as a judgment on the merits for the defendant, unless the Judge otherwise directs. We have no similar provision in this Province, so that a judgment of non-suit in ordinary actions in the Division Court has now the same effect only that it always had, and a second action can be brought: *Building and Loan Association v. Heimrod* 3 C. L. Times 361, 19 L. J. N. S. 254; *In re Willing v. Elliott*, 37 U. C. R. 320; *Clarke v. Macdonald*, 4 Ont. R. 310; *Pryor v. City Offices Co.*, 10 Q. B. D. 504; *Davis v. Great Eastern Ry. Co.*, 39 L. T. N. S. 635; *Bank of Ottawa v. McLaughlin*, 8 App. R. 543; *Poyser v. Minors*, 7 Q. B. D. 329.

Division Court Statutes do not contain any provision such as is to be found in the English County Courts Amendment Act of 19 and 20 Victoria, chapter 108, section 72, where provision is made that a claimant of goods taken in execution may deposit with the Bailiff either the amount of the value of the goods claimed, or the sum which the Bailiff may be allowed to charge for keeping possession of such goods until the decision in the interpleader issue can be obtained, and in default of so doing the Bailiff shall sell such goods as if no such claim had been made, and shall pay into Court the proceeds of such sale to abide the decision of the Judge.

A Division Court Bailiff under our law has no  
s

alternative but to keep possession of the goods or chattels seized, and should he take a bond from the debtor and allow him to remain in possession of the goods, or otherwise abandon the possession, the rights of other creditors—*Roe v. Roper*, 23 C. P. 76; *Williams v. Grey*, 23 C. P. 561; Sinclair's D. C. Act, 176; *Blades v. Arundel*, 1 M. & S. 711; *Darby v. Waterlow*, L. R. 3 C. P. 453—or of the landlord—*Cropper v. Warner*, 1 C. & E. 152; *Craig v. Craig*, 7 P. R. 209; *McIntyre v. Stata*, 4 C. P. 248—would prevail.

Should the execution creditor be prejudiced by the Bailiff's abandoning the seizure, the latter would be liable: *Maclean v. Anthony*, 6 Ont. R. 330. The right of the Bailiff in England to sell the goods on default of the claimant making the deposit is very advantageous: *Cramer v. Matthews*, 7 Q. B. D. 425.

Under the power to stay proceedings the Court or Judge has the power to stay the action against the execution creditor as well as the officer: *Carpenter v. Pearce*, 27 L. J. Ex. 143.

In an interpleader suit the execution creditor may claim property which the execution debtor has disabled himself from claiming; for an *estoppel* which would be binding against the execution debtor in a claim put forward by him will not be binding on the execution creditor or the Bailiff, who are strangers to the acts of the execution debtor: *Richards v. Johnston*, 4 H. & N. 660.

On a Bailiff's selling goods under execution he gives no better title than the debtor possessed, nor does he by the simple act of sale warrant any title

to the purchaser: *Chapman v. Speller*, 14 Q. B. 621.

A bill of sale or chattel mortgage of *after acquired property* gives nothing more than a mere right to seize, or in other words a mere equitable interest in the chattels afterwards acquired, subject to such right becoming a legal title by seizure before the rights of others intervene, but should seizure or execution from the Division Court, or any other Court, or the granting of a subsequent bill of sale or chattel mortgage taken without notice of the first, intervene before seizure, the equitable interest would be thereby defeated, and the chattels would be subject to such execution or bill of sale, or chattel mortgage: *Hallas v. Robinson*, W. N. 1885, p. 50; *Reeve v. Whitmore*, 9 Jur. N. S. 1214; *Belding v. Read*, 3 H. & C. 955. See, however, *Clements v. Matthews*, 11 Q. B. D. 808.

Where there is a clause in an ordinary building contract that all building and other materials brought by a builder upon the land shall become the property of the landowner the landlord is entitled to hold them against the creditors of the builder, and it is not a bill of sale requiring registration: *Reeves v. Barlow*, 11 Q. B. D. 610.

An extended reference to the authorities bearing on the rights to chattel property under bills of sale or chattel mortgages would require a treatise in itself, so that nothing more can be done here than to point out where such subjects will be found discussed and where the cases are collected. See Barron on Bills of Sale and Chattel Mortgages; Millar on Bills of Sale; Rob. & Jos. Digest, 573-597, 4332-4341; Ontario Digest (1883)

84-93 and the cases reported since then ; Fisher's Digest, 1301-1332, 9258-9265 ; Law Reports Digest, (1880) 451-480 ; Law Reports Digest (1883) 170-184 and cases subsequently reported.

A Bailiff is not entitled to fees for seizing and remaining in possession of goods belonging to a stranger : *Bilke v. Havelock*, 3 Camp. 374 ; and if a Bailiff should proceed to sell the goods seized without the authority or against the will of the execution creditor, or the person otherwise entitled to the judgment, for the amount of his fees on the execution he would be a trespasser : *Sneary v. Abdy*, 1 Ex. D. 299.

It is submitted that a Bailiff cannot depute another person to execute a writ of execution for him, but must do so himself or by his deputy duly appointed under 45 Victoria, chapter 7, section 4 : *Whitehead v. Fothergill*, Dra. Rep. 200 ; *Rattan v. Ashford*, 3 O. S. 302 ; *Gregory v. Cotterell*, 5 E. & B. 571 ; *The Palomares*, 10 P. D. 36.

A question will at once arise whether a Judge must try the question of damage himself, as he was formerly obliged to do in interpleader cases in questions of property only—*Munsie v. McKinley*, 15 C. P. 50 ; *Re Turner v. Imperial Bank of Canada*, 9 P. R. p. 21—or whether a jury can be summoned at the instance of either party, or the Judge can call one in Court under section 122 of the Division Courts Act, to try such question. By section 10 (1) of 47 Victoria, chapter 10 (Ontario), (Sinclair's D. C. Law, 1884, page 57), either party to an interpleader issue in a Division Court may require a jury, and by sub-section (2) of

the same section, section 122 of the Division Courts Act is made applicable to such cases. By section 14 of the Act under consideration it is declared that it "shall be read and construed as part of *The Division Courts Act*, and of any Acts amending the same." This Act of 1885, therefore, is by this section incorporated as part of the Division Courts system. But trial by jury is the exception in these Courts, and can only be given by statutory enactment. The above mentioned Statute of 47 Victoria, chapter 10, section 10 (1), cannot apply, because its language is that "either party to an *interpleader issue* in a Division Court may require a jury to be summoned *to try the issue*." Such of the provisions of the Act of 1880 as are applied to interpleader proceedings by the Statute last quoted do not authorize a jury. At first sight it might appear that the 7th section of the present Act would permit of a jury being summoned, but a closer examination will shew that it does not. The right to have a jury summoned must therefore depend on the applicability of sections 109, 110 and the following sections of the Division Courts Act to a claim for damages in consequence of the seizure. It will be seen that both from the language and spirit of these sections they are inapplicable to such a case. If the legislature had intended to give all the rights that an ordinary suitor would have, it could easily have said so, but instead of doing that the rights of defence, counter-claim and appeal, and the right and liability to costs only are specifically mentioned.

A superficial glance at the 122nd section of the

Division Courts Act would seem to be applicable to such a case as that we are considering, but so it would in the same way to interpleader issues when *Munsie v. McKinley*, 15 C. P. 50 was decided; yet the Court there held that the Judge must "adjudicate on the claim" himself without the aid of a jury. The writer, therefore, reluctantly comes to the opinion that the question of damages arising or capable of arising out of the execution of the process must be determined by the Judge alone. The anomaly will appear, that a jury may be trying the right to the property seized or attached, and the Judge the subject of damages in consequence of such seizure. The legislature only can supply the remedy if any is needed.

No provision is made for any formal statement of claim for damages, or notice of it to the opposite party. Possibly it may be found necessary for the Board of County Judges to frame rules concerning the practice and proceedings in such cases. Until then each Judge might lay down for the guidance of suitors and others in his own Courts, some general rules of practice to be observed, with the object of facilitating the speedy, just and fair trial of the questions presented. The Judge could not impose any conditions inconsistent with the provisions of the Statute: *R. v. Pawlett*, L. R. 8 Q. B. 491.

The execution creditor, not having authorized the seizure, is not bound to contest the interpleader issue, and if after service of summons he abandoned all claim to the goods, he could not be made liable for the Bailiff's costs: *C. v. D.*, W. N. 1883, 207;

*Can. Bank of Commerce v. Tasker*, 8 P. R. 351 ; but if he gave the Bailiff special directions to seize, he would be liable for such costs: *Vanstaden v. Vanstaden*, 21 L. J. N. S. 58.

(c) JUDGE TO MAKE ORDER.

When the Judge has formally declared his decision, and when the same is embodied in an order and entered in the Procedure Book, it then becomes evidence of the adjudication mentioned in the Statute. As has been already remarked no particular form of words is necessary to constitute a valid order of adjudication: *Oliphant v. Leslie*, 24 U. C. R. 398; *Hunter v. Vanstone*, 7 App. R. 750.

(d) COSTS.

It will be observed that the subject of costs is mentioned twice in the section; first in regard to the costs of the interpleader proceeding to test the right to the goods seized, and second, in respect to the costs of the proceeding incident to the inquiry as to damages.

As to the question of costs between the parties to the interpleader issue it may be said that costs usually follow the result.

It is a rule generally observed and subject to few exceptions, if any: *Seaward v. Williams*, 1 Dowl. 528; *Scales v. Sargeson*, 3 Dowl. 707; *Wills v. Hopkins*, 3 Dowl. 346; *Bank of Montreal v. Little* 17 Grant, 685. The costs are generally made to follow the event as of course: *Bowen v. Bramidge* 2 Dowl. 213; *Wilson v. Wilson*, 7 P. R. 407; *Bellhouse v. Gunn*, 20 U. C. R. 555; *Macpherson v. Norris*, 3 U. C. L. J. 49.



When each party succeeds as to part, the costs will be apportioned: *Lewis v. Holding*, 3 Scott N.R. 191; *Staley v. Bedwell*, 10 A. & E. 145; *Clifton v. Davis*, 6 E. & B. 392; *Dempsey v. Caspar*, 1 P. R. 134; *Carter v. Stewart*, 7 P. R. 85; *Segsworth v. Meriden Silver Plating Co.*, 3 Ont. R. 413.

Should either the execution creditor or the claimant, after the issue, at the instance of the Bailiff, of the interpleader summons, wish to abandon all claim to the goods, it is not definitely established what the effect of doing so would be on the question of costs.

If an execution creditor had not given any instructions as to the seizure of the goods, and on being made aware of it had given notice of his abandonment of all claim to them, it is submitted that he could not be held responsible for costs: *Wilkins v. Peatman*, 7 P. R. 84; *Canadian Bank of Commerce v. Tusker*, 8 P. R. 351; *Rooda v. Gun and Shot and Griffin's Wharves Co.*, 28 L. T. N. S. 635.

The question of costs cannot be considered before the disposal of the issue: *Salter v. McLeod*, 10 U. C. L. J. 299.

As security for costs can now be ordered in the Division Court: *Re Fletcher v. Noble*, 9 P. R. 255, the writer sees no reason why such security cannot be ordered in an interpleader issue: *Lovell v. Wardroper*, 4 P. R. 265.

Should there manifestly appear to be no *bona fide* claim to the goods by a claimant, he could not, it is submitted, obtain security for costs from the other party: *Doer v. Rand*, 10 P. R. 165; *De St. Martin v. Davis*, W. N. 1884, p. 86; *Anglo-American v.*

*Rowlin*, 20 L. J. N. S. 371 ; *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539.

Assuming that security for costs in interpleader cases in the Division Court can be ordered, reference to some of the later cases on the general question may not be out of place here.

The parties to an interpleader issue are really in the position of plaintiffs in an ordinary action, and the defendant, the execution creditor, can be ordered to give security for costs as well as the plaintiff : *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539.

The case of *Belmonte v. Aynard*, 4 C. P. D. 221, 352, which decided that when a litigant who resided abroad was for mere convenience made plaintiff in an interpleader issue, and where one of the defendants was really interested in the result as a plaintiff, the plaintiff could not be called on to give security for costs, was not followed in the case just cited.

A married woman will now be ordered to give security for costs in the same cases that an unmarried woman would be so ordered : Griffith on Married Women's Property, 23, 24, 30. *Sweetman v. Morrison*, 10 P. R. 446.

The application for security for costs may now be made at any time : *Lydney and Wiggpool Iron Ore Co. v. Bird*, 23 Ch. D. 358 ; *Budworth v. Bell*, 21 L. J. N. S. 142.

The statement of a party's residence out of the jurisdiction on information and belief is not sufficient : *Hollingsworth v. Hollingsworth*, 10 P. R. 58.

Where a plaintiff leaves the jurisdiction perma-

nently during the pendency of an action, security for costs will be ordered: *Hately v. The Merchants Despatch Trans. Co.*, 10 P. R. 253.

Where a defendant admits the plaintiff's cause of action and sets up a counter-claim founded on a distinct claim he is not entitled to security for costs: *Winterfield v. Bradnum*, 3 Q. B. D. 325, nor can a foreigner residing abroad be ordered to give security for costs on his counter-claiming the plaintiff's claim: *Mapleson v. Misini*, 5 Q. B. D. 144; see also *The Julia Fisher*, 2 P. D. 115.

Where one of the bondsmen for security for costs has become worthless a new one will be ordered: *Gage v. The Canada Pub. Co.*, 10 P. R. 169.

An intended application for immediate judgment is no reason for refusing an order for security for costs: *Le Banque des Travaux Publiques, &c. v. Wallis*, W. N. 1884, 64.

It is submitted that where a Judge refuses to make an order against a defendant on a judgment summons, by reason of the absence of any property of the defendant's, it would be strong presumptive evidence in an action by him of his liability to give security for costs, unless the defendant could shew that his circumstances had afterwards improved: See *Nixon v. Sheldon*, W. N. 1884, 81.

A defendant is entitled to security for costs from a plaintiff whose permanent residence is foreign, if at the time the application is made the plaintiff is actually out of the jurisdiction. The only answer to the application is the plaintiff's

return within the jurisdiction: *Robertson v. Cowan*, 21 L. J. N. S. 140.

Security for costs was ordered in a penal action in *Budworth v. Bell*, 21 L. J. N. S. 142.

A temporary residence of one of several plaintiffs within the jurisdiction will prevent the making of the order: *Redondo v. Chaytor*, 4 Q. B. D. 453; *Reynolds v. Barker*, 21 L. J. N. S. 80; *Ebrard v. Gassier*, W. N. 1885, 1.

The subsequent acquisition of property is no ground for rescinding an order for security for costs: *Reaume v. Leavitt*, 6 P. R. 70.

See *Re Rees-Urquhart v. Toronto Trusts Co.*, 10 P. R. 425, as to security for costs on coming into the Master's office as creditors on the administration of an estate, and *In re Photographic Artists' Co-operative Supply Ass.*, 23 Ch. D. 370, where a limited company appealed from a winding-up order without joining any one responsible for costs.

On the subject of security for costs generally, see Fisher's Digest, 2028-2041, 9355; L. R. Digest, 1126, 1127, 3050; L. R. Digest (1883), 294; Rob. & Jos. Digest, 788-800, 1903, 4393-4395; Ontario Digest (1884), 153; Arch. Pract. "Security for Costs"; Lush. Pract., 928-934.

One bondsman, if perfectly good, could be accepted: *Re Fletcher v. Noble*, 9 P. R. 255; but a married woman might probably be rejected: *Mullin v. Pascoe*, 8 P. R. 372.

Where one of the defendants in an interpleader issue is really interested in the result thereof as a plaintiff, he is not entitled to call upon the plaintiff in the issue to give security for costs upon the

ground that the latter is a foreigner residing abroad : *Belmonte v. Aynard*, 4 C. P. D. 221, 352.

Past as well as future costs may be ordered to such an amount as the Judge may think fit : *Massey v. Allen*, 12 Ch. D. 807.

The High Court of Justice would have no power to interfere with the discretion exercised by the Judge of the Division Court on a question of costs : *Churchward v. Coleman*, L. R. 2 Q. B. 18.

Independently of the Judge's order there would be no duty cast on either execution creditor or claimant to pay the costs of the interpleader proceedings : *Bloor v. Huston*, 15 C. B. p. 275.

On the subject of interpleader generally in the Division Court, see Sinclair's D. C. Act, 213-217.

As to the question of costs in interpleader issues in the Higher Courts, see *Masuret v. Lansdell*, 8 P. R. 57 ; *Phipps v. Beamer*, 8 P. R. 181 ; *Beaty v. Bryce*, 9 P. R. 320 ; *Arkell v. Geiger*, 9 P. R. 523 ; *Christie v. Conway*, 9 P. R. 529 ; *O'Brien v. Ball*, 9 P. R. 494 ; *Brown v. Nelson*, 10 P. R. 421 ; *Sweetman v. Morrison* 10 P. R. 446 ; *Vanstaden v. Vanstaden*, 10 P. R. 428.

(e) SHALL ADJUDICATE AS TO DAMAGE OCCASIONED  
BY SEIZURE.

This provision it will be seen is new in Division Court law.

The absence of such an enactment was pointed out at pages 217 and 218 of Sinclair's D. C. Law, 1884, and the hardship of it was experienced in the case of *Farrow v. Tobin*, 8 App. R. 69.

It is taken from the English Statute of 30 and 31 Victoria, chapter 142, section 31, and "is a section

for the relief of the (High) Bailiff from the position in which he is placed by conflicting claims": *Per* Huddleston, B., in *Cramer v. Matthews*, 7 Q. B. D. p. 429.

The material words are exactly alike in both Statutes, changes being made in our Statute to suit the altered circumstances.

The words of that part of the section of the English Act are these: "And (the Judge) shall also adjudicate between such parties," (the party issuing the process under which the goods or chattels were taken in execution, or who makes claim to their proceeds or value, and the party making the claim), "or either of them, and the High Bailiff, with respect to any damage or claim of or to damages arising, or capable of arising, out of the execution of such process by the High Bailiff, and make such order in respect thereof, and of the costs of the proceedings, as to him shall seem fit; and such orders" (that is as to the right to the goods and the damages) "shall be enforced in like manner as any order in any suit brought in such Court, and shall be final and conclusive as between the parties, and as between them, or either of them, and the High Bailiff, unless the decision of the Court shall be in either case appealed from, and upon the issue of the summons any action which shall have been brought in any Court in respect of such claim *or of any damage arising out of the execution of such process shall be stayed.*"

The object of this addition to the 210th section of the Division Courts Act is to provide a summary and inexpensive remedy for the parties to the

interpleader issue, and the Bailiff as the officer executing the process, to have the damages, (if any) occasioned by this seizure summarily settled. It is confined to them entirely, and has no application whatever to other parties, whether purchasers of the goods or otherwise. *Hills v. Renny*, 5 Ex. D. 313.

The Judge has power and it is his imperative duty not only to adjudicate between the parties to the issue or either of them, but also as between either of them and the officer or Bailiff in respect of any damage, or claim of or to damages arising or capable of arising out of the execution of the process by the officer or Bailiff.

The words of the section are very comprehensive, and are intended to cover, and it is submitted do cover all and every claim for damages which any of the parties would have had against the other in any way arising, or that by possibility might arise out of the execution of the process.

A question may arise on seizure made under warrant of attachment issued by a County Judge or Justice of the Peace, under the 191st section of the Division Courts Act, and damages ensue, whether such damages would be the subject of adjudication under this section. It is submitted that a liberal construction of the section should be given, and that such warrant would be "process of a (any) Division Court," under the primary part of section 210.

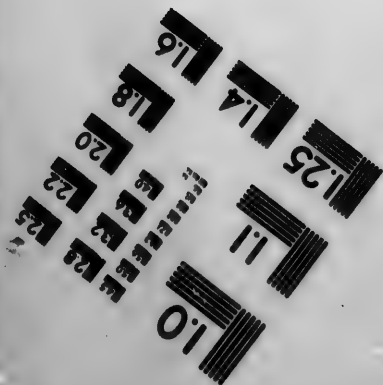
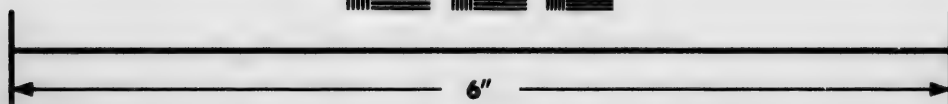
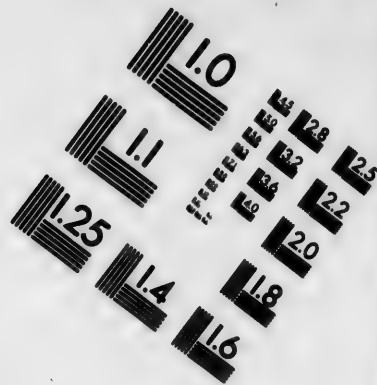
We think that if any of the parties mentioned in this new provision had any claim for damages within the meaning of this section it would be his

duty to assert it in the interpleader issue. If he should lieidly by, not choosing to assert his claim to damages, and allow the Judge to adjudicate upon the other questions he would be concluded by it. The object of the section is that there should be but one trial not only as to the right to the goods or chattels seized, or their proceeds, but also as to all damages, whether against officer or party, which might by possibility arise out of the execution of the process. He should have sought an adjudication on the question of damages during the pendency of the interpleader issue, and not having done so he should afterwards be estopped from making claim to them: *Death v. Harrison*, L. R. 6 Ex. 15; *Rossi v. Bailey*, L. R. 3 Q. B. 621; *Jones v. Hill*, L. R. 5 Q. B. 230; *Wallace v. Bossqm*, 2 Sup. R. 488; *Phosphate Sewage Co. v. Molleson*, 4 App. Cas. 801; *Lightbound v. Hill*, 32 C. P. 249; *Peareth v. Marriott*, 23 Ch. D. 182; *Kendall v. Hamilton*, 4 App. Cas. 504; *Ex parte Harper*, *In re Bremner*, L. R. 10 Ch. 379; *Austin v. Mills*, 9 Ex. 288; *Flitters v. Allfrey*, L. R. 10 C. P. 29; *Millett v. Coleman*, 33 L. T. N. S. 204; *Hunter v. Vanstone*, 7 App. R. 750; *Mason v. Wirral Highway Board*, 4 Q. B. D. 459.

Should any person take the benefit of any order made under this section he would have to take the burden of those parts of the order unfavorable to him: *Hayward v. Duff*, 12 C. B. N. S. 364; *Giraud v. Austen*, 1 Dowl. N. S. 703; *Tinkler v. Hilder*, 4 Ex. 187; *Simmons v. King*, 2 D. & L. 786; *Thompson v. Langridge*, 5 D. & L. 213.

If the matter upon which the Judge adjudicated, or had the right to adjudicate upon, be beyond his





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jurisdiction or the scope of the enactment, then of course it would not be a bar to an action: *R. v. Hutchings*, 6 Q. B. D. 300; *Sinclair's D. C. Act* 42; except as governed by section 7 of this Act.

By the first part of section 210 of our Division Court Act (which follows section 118 of 9 and 10 Victoria, chapter 95 of the Imperial Act), provision is made for staying proceedings in an action in any of our Courts brought in respect of the claim to the goods seized, against the officer.

Instances of this application and of the effect of interpleader generally will be found discussed in the following cases: *Tinkler v. Hilder*, 4 Ex. 187; *Jessop v. Crawley*, 15 Q. B. 212; *Foster v. Pritchard*, 2 H. & N. 151; *Jones v. Williams*, 4 H. & N. 706; *Mercer v. Stanbury*, 2 H. & N. 155; *Winter v. Bartholomew*, 11 Ex. 704; *Finlayson v. Howard*, 1 P. R. 224; *Washington v. Webb*, 16 U. C. R. 232; *Schamehorn v. Traske*, 30 U. C. R. 543. And see also *Cater v. Chignell*, 15 Q. B. 217; *Abbott v. Richards*, 15 M. & W. 194; *Jousiffe v. Bayley*, 15 L. T. N. S. 219; *Carpenter v. Pierce*, 27 L. J. Ex. 143; *Oliphant v. Leslie*, 24 U. C. R. 398; *Walker v. Olding*, 1 H. & C. 621; *McIntosh v. McIntosh*, 18 Grant 58; *Hollier v. Laurie*, 3 C. B. 334; *Harmer v. Cowan*, 23 U. C. R. 479; *Best v. Hayes*, 1 H. & C. 718; *Macfie v. Hunter*, 9 P. R. 149; *Tanner v. European Bank (Limited)*, L. R. 1 Ex. 261; *Hunter v. Vanstone*, 7 App. R. 750; *Farrow v. Tobin*, 10 App. R. 69; *Booth v. Preston and Berlin Ry. Co.*, 6 U. C. L. J. 57.

Under the section of the English Act (30 and 31 Victoria, chapter 142, section 31,) which we have already quoted at page 157, it will be seen that

provision is made for applying to stay proceedings in any action between any of the parties for damages capable of arising in consequence of the seizure.

But, for some reason which the writer cannot understand, no such provision has been made in this new section which we are considering. In the English Statute the whole section with the amendment is re-enacted. In ours an amendment of the 3rd sub-section of section 210 is interjected without reference to a stay of proceedings in actions as to matters of damage. But as has already been remarked, on the authority of *Death v. Harrison*, L. R. 6 Ex. 15, and the other authorities above cited with it, any of the parties to the interpleader issue, or the officer or Bailiff executing the process, could in action against him invoke the protection of the Statute, and in defence set up that the matters sued for were such as had been or could have been decided on the trial of the interpleader issue. In commenting on the section of the English Act in *Death v. Harrison*, L. R. 6 Ex., at page 19 Martin, B., says: "The case then being within the words of the Statute, section 31, says expressly that the order made shall be final and conclusive. This is equivalent to saying that the whole matter between the parties shall be at an end; and I have no doubt that the words were inserted with that very intention. The legislature directed this measure to meet the exigencies of common affairs, notwithstanding that in some exceptional and doubtful cases a hardship may be inflicted."

A form of statement of defence will be found in the report of the case just quoted from.

In *Hills v. Renny*, 5 Ex. D. 313, it was held that although the section of the English Act allowed a stay of proceedings in an action against the officers of the Court by the claimant for wrongfully depriving him of his goods, yet, that an action against the purchasers of the goods from the officers of the Court would not be stayed, as the language of the Statute was not sufficiently comprehensive as to them. At page 319 of the report, Thesiger, L. J., says: "The position of a purchaser from the High Bailiff must be determined in the action in which he is sued."

It will therefore appear that the only course open to any one who may be sued in consequence of the seizure of the goods by the officer is to set up the proceedings and adjudication, provided he is one of those within the purview of the section. If not, his defence must be on common law grounds.

As this section will now render it necessary to consider in Division Court interpleader issues something more than the mere question of the right to the goods and chattels or their proceeds, some of the cases bearing on the liability of parties and the extent of their liability may not inappropriately be mentioned here.

An execution creditor who has simply placed his execution in the hands of a Division Court Bailiff is not liable to the person whose goods have been wrongfully taken in execution for any damage sustained by him in consequence of their seizure or sale under interpleader proceedings: *Walker v.*

*Olding*, 1 H. & C. 621. In the higher Courts an interpleader order is made by a Judge, and on its being granted the Sheriff or other officer is only responsible for the damages (if any), up to the granting of such order. In the Division Court it is the Bailiff who causes the interpleader summons to be issued, without the intervention of the Court or Judge.

Where the question of damage against the Bailiff has to be considered, it will always become a question whether he should be held responsible for damages occasioned to the owner of the goods or chattels up to the Judge's adjudication upon the claim, or only up to the issue of the summons. The law casts around a public officer in the *bona fide* execution of his duty every reasonable protection, and will not unduly subject him to heavy damages unless clearly in the wrong.

A Bailiff having an execution against the goods and chattels of one man is a trespasser if he seize the goods of another. The warrant of execution does not authorize him to do so, and like every other wrong-doer he must be held responsible for his wrongful acts: *McArthur v. Cool*, 19 U. C. R. 482, 483. The case of *Farrow v. Tobin*, 10 App. R. 69 is in affirmance of the same doctrine.

But the writer submits that on the Bailiff's calling the claimant of the goods and the execution creditor before the Court, by the issue and service of the interpleader summons, to test their respective rights, any claim for damages incurred subsequent to that proceeding would not be recoverable from the Bailiff: *Henry v. Mitchell*, 37 U. C. R.

217; *Walker v. Olding*, 1 H. & C. 621; *Lister v. Northern Ry. Co.*, 19 C. P. 408; *Kennedy v. Patterson*, 22 U. C. R. 556.

If the execution creditor directed a seizure of the wrong goods he would be liable as a trespasser, and a decision adverse to him would, under the words of the section under consideration, be conclusive against his right to the goods: *Harmer v. Gouinlock*, 21 U. C. R. 260; *May v. Howland*, 19 U. C. R. 66; *Henry v. Mitchell*, 37 U. C. R. 217.

The interpleader proceeding, though it might be a protection to the Bailiff, would not be so to the execution creditor, who had directed the seizure: *Park v. Taylor*, 1 C. P. 414; *McCollum v. Kerr*, 8 U. C. L. J. 71; *Stokes v. Eaton*, 3 C. P. 267; *Oliphant v. Leslie*, 24 U. C. R. 398; *Lough v. Coleman*, 29 U. C. R. 367.

The execution creditor does not render himself liable by relation for the seizure previously made, from the fact that he contests the interpleader issue: *Kennedy v. Patterson*, 22 U. C. R. 556; *Woolen v. Wright*, 1 H. & C. 554; *Walker v. Olding*, 1 H. & C. 621; *Phillips v. Findlay*, 27 U. C. R. 32; *Tilt v. Jarvis*, 7 C. P. 145; *McLeod v. Fortune*, 19 U. C. R. 98; *Toppin v. Buckerfield*, 1 C. & E. 157.

Nor would the claimant of the goods seized by contesting an interpleader issue waive his right to seek damages from the execution creditor in case the latter would be responsible for seizing and selling his goods: *Cotton v. Stokes*, 10 U. C. R. 262.

It would seem that notwithstanding the fact of the instruction by a creditor to a Bailiff to seize, the creditor could not be held responsible for

damages beyond the service of the interpleader summons, unless there was some fresh act of trespass: *Lister v. Northern Ry. Co.*, 19 C. P. 408; *Kennedy v. Patterson*, 22 U. C. R. 556.

There are some remarks in *Henry v. Mitchell* 37 U. C. R. 217, that may appear somewhat at variance with the authority of these cases, but the opinions expressed in them are too strong to be overturned by anything but the most direct and authoritative decision.

If a stranger having no legal process goes to a defendant and takes down in his presence a list of his goods, and tells him he must not remove them, and does nothing more, he cannot be made liable as a trespasser. So if a Bailiff has so acted under a legal process, he may have bound the property as against other executions, but he could not be held liable in trespass, as he neither removed, detained nor handled the goods: *Cameron v. Lount*, 4 U. C. R. 275.

The earlier cases in England and this Province appear to go far to sustain the view that a client is liable for the instructions that his solicitor gives to a Sheriff or Bailiff as to the execution of a writ of execution,

The cases of *Jarmain v. Hooper*, 6 M. & G. 827; *Levi v. Abbott*, 4 Ex. 588; *Collett v. Foster*, 2 H. & N. 356 and *Walker v. Olding*, 1 H. & C. 621, were until lately the leading authorities in England on the liability of the client for a trespass committed by an officer under instructions of the solicitor.

In this Province the authority of the solicitor to bind the client was recognized to a very full extent



in the cases of *Slaght v. West*, 25 U. C. R. 391; *McClevertie v. Massie*, 21 C. P. 516; *Phillips v. Findlay*, 27 U. C. R. 32. In the latter case the present Chief Justice of the Province says at page 34 of the report: "The latter (the execution creditor) is clearly liable if his attorney give such a direction as causes the mistake." In support of this proposition the cases of *Wilson v. Tumman*, 6 M. & G. 242 and *Jarmain v. Hooper*, 6 M. & G. 827, are cited. He says, however, that if the writ is delivered to the officer without any instructions, and to be acted on in the usual course, the creditor cannot be held liable if the wrong person's goods are seized. But the subject of the creditor's liability for the acts of his solicitor has, at a comparatively recent date come up for decision in the Court of Appeal in England, and a full review of the leading cases there took place. The result is that a much more reasonable limit has been placed to the liability of the creditor than the earlier cases would seem to decide.

In *Smith v Keal*, 9 Q. B. D. 340, the facts were these: The defendant had recovered judgment against one Law, who had at one time been in partnership with the plaintiff, and issued execution upon such judgment. After the delivery of the *fi. fa.* to the Sheriff, his officer, doubting as to the goods available for seizure under it, wrote to the defendant's solicitors, asking for an interview, and their managing clerk accordingly had an interview with the Sheriff's officer, and had some conversation about some goods at a brewery, which was the address indorsed on the writ. To the

officer's request for information the Clerk answered that he thought that Law had a share in the brewery, and that the Sheriff had better seize there. After this conversation the officer seized at the brewery some goods belonging to the present plaintiff. The plaintiff claimed the goods as his exclusive property. An interpleader issue, to try the question whether the goods were the property of the plaintiff as against the defendant, was ordered and tried. It was decided in favour of the plaintiff, who then brought an action against the defendant for the wrongful seizure of his goods by the Sheriff. The plaintiff was nonsuited at the trial. He obtained a rule to set aside the non-suit, but after argument the application was refused by Manisty and Stephen, J. J. and Pollock, B. The plaintiff appealed from that decision, relying on *Jarmain v. Hooper*, 6 M. & G. 827, and *Levi v. Abbott*, 4 Ex. 588, already cited. The defendant's counsel relied on *Childers v. Wooler*, 2 E. & E. 287; *Wilson v. Tumman*, 6 M. & G. 236; *Cronshaw v. Chapman*, 7 H. & N. 911, and *Collins v. Evans*, 5 Q. B. 820. The Court of Appeal unanimously declared the law to be (1) That whether a seizure of particular goods under a *fi. fa.* was directed by the execution creditor so as to make him liable for the act of the Sheriff is a question of fact. (2) That it is *not* within the scope of the implied authority of the solicitor of a judgment creditor issuing a *fi. fa.* to direct the Sheriff to seize *particular* goods. At page 354 of the report Lindley, L. J. is reported as saying: "It is not within a solicitor's authority to tell the Sheriff

how to perform his duty. It is the Sheriff's business to find out what goods to seize, and if he seizes the goods of the wrong person such person has his remedy against the Sheriff, but upon what principle can the innocent execution creditor be made liable?"

The Judges distinguish that case from *Jarmain v. Hooper*, 6 M. & G. 827, but a close examination of the late case will show that the authority of *Jarmain v. Hooper* is pretty much nullified by *Smith v. Keal*, 9 Q. B. D. 340.

A further difficulty will be experienced in cases in the Division Court, namely, the absence of any solicitor, recognized by law, whose name must in the higher Courts appear on the writ of execution. In the Division Court the party attempting to charge the execution creditor with trespass through the act of another must be prepared to prove that such person had either expressly or impliedly authority to render the creditor liable for his acts if wrongful. *Pole v. Leask*, 9 Jur. N. S. 829; *Myles v. Thompson*, 23 U. C. R. 553; *The Gore Bank v. Crooks*, 26 U. C. R. 251, 20 L. J. N. S. p. 228.

A married woman may maintain a claim on interpleader: *Shingler v. Holt*, 7 H. & N. 65; 47 Victoria (Ontario), Chapter 19, sect. 11, but the provisions of the interpleader Acts would not apply where the Crown is interested: *Candy v. Maughan*, 6 M. & G. 710.

They would apply to foreigners residing abroad: *Attenborough v. London and St. Katharine's Dock Co.*, 3 C. P. D. 450; *Belmont v. Aynard*, 4 C. P. D.

221, 352 : *The Credits Gerundeuse (Limited) v. Van Weede*, 12 Q. B. D. 171.

A commission could issue under the 99th section of the Division Courts Act to take evidence to be used in any case arising under the 210th section as amended by this section ; see *White v. Watts*, 12 C. B. N. S. 267.

It is not necessary on the trial of an interpleader issue to prove the judgment or execution against the debtor : *Hammill v. De Wolf*, 10 C. P. 419 ; *Holden v. Langley*, *Patterson v. Langley*, 11 C. P. 407, 411 ; *McWhirter v. Learmouth*, 18 C. P. 136.

It is submitted that the same rule would prevail in trying the question of damage. In an interpleader issue the plaintiff rested his case upon proof of a chattel mortgage of certain goods mentioned therein, made to him by the execution debtor, and duly filed. It was held clearly insufficient, for it afforded no proof that the goods mortgaged were the same as those seized by the Sheriff and claimed : *Jones v. Jenkins*, 25 U. C. R. 151.

The Interpleader Act makes no distinction between an attaching and an execution creditor, and whatever transfers the Sheriff may impeach the attaching creditor may also impeach : *Doyle v. Lasher*, 16 C. P. 263 ; *Parkes v. St. George*, 10 App. R. 496 and cases there cited.

The execution creditor could not sustain a claim to property stolen from the plaintiff even though innocently purchased by the execution debtor or some one under whom he claimed : *Bowman v.*

*Yielding*, M. T. 3 Vict.; *White v. Spettigue*, 13 M. & W. 603; *Lee v. Bayes*, 18 C. B. 599.

If A. leases goods to B. and they are seized under an execution against B., but are not sold or removed, A has no claim against the officer, because his reversionary interest has not been damaged: *Henderson v. Moodie*, 3 U. C. R. 348, but should A's reversionary interest be prejudicially affected by the seizure damages would be recoverable.

Growing crops are the subject of seizure and sale on Division Court execution, and consequently can be the subject of an interpleader issue in the Division Court and of damages under this section: *Ingram v. Taylor*, 7 App. R. 216; *Grass v. Austin*, 7 App. R. 511; *Hamilton v. Harrison*, 46 U. C. R. 127; *Haydon v. Crawford*, 3 O. S. 308, 583; *Campbell v. Cushman*, 4 U. C. R. 9. As to a bill of sale of future crops, see *Clements v. Matthews*, 11 Q. B. D. 808; *Joseph v. Lyons*, 51 L. T. N. S. 740. A bill of sale of growing crops does not require registration: *Hamilton v. Harrison*, 46 U. C. R. 127; nor an assignment for the general benefit of creditors: *Robertson v. Thomas*, 8 Ont. R. 20. A claim to goods condemned under the revenue laws could not be sustained: *Dame v. Carberry*, 10 U. C. R. 332.

If a person has the possession of goods that is sufficient as against a Bailiff, who has no right to take them: *Porter v. Flintoff*, 6 C. P. 337; *Green v. Stevens*, 2 H. & N. 146; *Shingler v. Holt*, 7 H. & N. 65; *Mason v. Morgan*, 24 U. C. R. 328.

A claim of lien, if established, would sustain a claimant's right: *Rogers v. Kennay*, 9 Q. B. 592.

A mortgagee who has not taken actual possession

is not liable for any injury occasioned by the goods mortgaged: *Campbell v. Reid*, 14 U. C. R. 305.

Goods exempt from distress for rent, such as those in actual use, could not be the subject of a valid sale: Woodfall's L. & T., Chapter X., section 3. Any purchaser relying on it would fail in an interpleader issue with the owner of the goods: *Couch v. Crawford*, 10 C. P. 491; *Miller v. Miller*; 17 C. P. 226.

So also would it be in the case of goods exempt from distress for rent for the benefit of trade: *Gildersleeve v. Ault*, 16 U. C. R. 401; *May v. Severs*, 24 C. P. 396; or because the property was exempt from distress on account of the owner being a militia officer: *Davey v. Cartwright*, 20 C. P. 1.

Goods in the custody of the law cannot be seized or sold so as to give title to them: *Hughes v. Towers*, 16 C. P. 287; *Peacock v. Purvis*, 2 B. & B. 362; *Wharton v. Naylor*, 12 Q. B. 673; *Foulger v. Taylor*, 5 H. & N. 202.

A purchaser of goods from a landlord, which the latter had purchased on sale under a distress warrant issued by himself, must fail in an interpleader issue with the tenant or any one lawfully claiming under him, on the principle that a landlord cannot lawfully purchase goods sold under his own distress warrant: *King v. England*, 4 B. & S. 782; *Williams v. Grey*, 23 C. P. 561; *Burnham v. Waddell*, 28 C. P. 263; unless the tenant consented to the sale: *Woods v. Rankin*, 18 C. P. 44.

A claimant setting up title under distress of the tenant's goods made off the demised premises would fail in an interpleader issue with the tenant unless

he could show a fraudulent removal to prevent a distress: Woodfall's, L. & T., chapter X, section 4; *Halsted v. McCormack*, E. T. 3 Vict.; *McArthur v. Walkley*, M. T. 4 Vict.; but not if there was an inception of the distress before removal: *Pulver v. Yereax*, 9 C. P. 270.

A person cannot sustain a sale of a stranger's goods distrained off the demised premises: *Peacey v. Ovas*, 26 C. P. 464; *Thornton v. Adams*, 5 M. & S. 38; *Postman v. Harrell*, 6 C. & P. 225; *Huskinson v. Lawrence*, 26 U. C. R. 570; *Fletcher v. Marillier*, 9 A. & E. 457; *Ferrier v. Cole*, 15 U. C. R. 561; *Foulger v. Taylor*, 5 H. & N. 202; *Sanderson v. The Kingston Marine Ry. Co.*, 3 U. C. R. 168; nor of the goods of lodgers or boarders exempt under 43 Victoria, chapter 16 (Ontario), and if in an interpleader issue such question should be in contest, the claim of the landlord or those claiming under him could not prevail.

A mere *irregular* distress, followed by sale of the goods distrained, would not affect the title of the purchaser of such goods: *Lucas v. Tarleton*, 3 H. & N. 116; *Wilson v. Nightingale*, 8 Q. B. 1034; *Robinson v. Waddington*, 13 Q. B. 753.

But a sale by a bailiff for his fees after payment or tender of rent to the landlord would give no title: *Harding v. Hall*, 14 W. R. 646; 2 L. C. Gazette 94; *Bennett v. Bayes*, 5 H. & N. 391; R. & J's Digest, 2064; nor would there in general be any title conferred by sale after a surrender or forfeiture of the term, eviction or other determination of the term: Woodfall's L. & T., chapter X; *Hartley v. Jarvis*, 7 U. C. R. 545; *May v. Severs*, 24 C. P. 396.

Neither party to an interpleader issue could sustain his claim under distress and sale of goods of a guest at an inn: Woodfall, chapter X, section 3.

It may be stated generally that a claim to goods cannot be sustained in an interpleader issue, where such claim is founded on a mere trespass, such as the seizure of goods on execution by breaking an outer door of a dwelling house: *Hollier v. Laurie*, 3 C. B. 334; *Hooper v. Lane*, 6 H. L. C. 535, and cases cited; *Newton v. Harland*, 1 M. & G. 658; *Kerbey v. Denby*, 1 M. & W. 336. Or where goods are privileged or exempt from distress or seizure either by common law or by Statute: Woodfall's L. & T., chapter X, section 3; *In re Progress Ass. Co.*, L. R. 9 Eq. 370; *In re London and Devon Biscuit Co.*, L. R. 12 Eq. 190; *Re Great Ship Co.*, 10 Jur. N. S. 3; *In re Plas-y-n-Mhowys Coal Co.*, L. R. 4 Eq. 689; *In re Lond. C. Co.*, L. R. 2 Eq. 53; *In re Potteries, Shrewsbury & North Wales Ry. Co.*, L. R. 5 Ch. 67; *Potteries, Shrewsbury & North Wales Co. v. Minor*, L. R. 6 Ch. 621; *Dalton v. Whittem*, 3 Q. B. 961; *Thompson v. Pettitt*, 10 Q. B. 101; *Moore v. Drinkwater*, 1 F. & F. 134; *Daragh v. Dunn*, 7 U. C. L. J. 273; *Davidson v. Reynolds*, 16 C. P. 140; *McMartin v. Hurlburt*, 2 App. R. 146; 43 Victoria (Ontario), chapter 16; Sinclair's D. Act, 177, 178.

"A Sheriff or his officer [or an officer of a Division Court] seizing goods under a writ of execution is responsible in damages if he takes the goods of the wrong person. If he takes the goods of a stranger, though the plaintiff assures him they are the defendant's goods, he is a trespasser: for



he is obliged at his peril to take notice whose the goods are. \* \* \* Where, therefore, two persons, being father and son, both had the same name of baptism and surname, and both resided in the same house, and an action was brought against the son, who suffered judgment by default, and a writ of execution was issued against him, under which the Sheriff by mistake took the goods of the father, it was held that the Sheriff was responsible for the consequences of his mistake." Addison on Torts, 5th Ed. 635, 636; *Jarmain v. Hooper*, 6 M. & G. 827.

A Bailiff has no right to seize the goods of a stranger in the possession of the execution debtor as the ostensible owner: *Dawson v. Wood*, 3 Taunt. 256.

If a woman who has furniture of her own cohabit with the execution debtor and assumes his name and gives herself out as his wife, and permits him to appear to be the owner of her furniture, this would not give the Bailiff any right to seize it under an execution against him: *Edwards v. Bridges*, 2 Stark, 396.

If a man and woman have actually gone through the form of marriage, and are supposed to be man and wife, and the goods have been seized and sold by the Bailiff as the goods of the husband, without any notice or objection, and it afterwards transpires that the marriage was void, and that the goods belonged to the supposed wife before the celebration of the void marriage, the Bailiff would be responsible to her in damages for unlawful seizure: *Glasspoole v. Young*, 9 B. & C. 701. But

if while the woman takes an active part in misleading the Bailiff, and asserts that she is the wife of the execution debtor, knowing the assertion to be untrue, she is then herself the cause of the injury of which she complains, and is estopped from disputing the accuracy of her representation: *Langford v. Foot*, 2 M. & Sc. 349; *Smout v. Ilbery*, 10 M. & W. 1; *Drew v. Nunn*, 4 Q. B. D. 661, 667, per Brett, L. J.; *Liverpool Co. v. Fairhurst*, 9 Ex. 422; and if it appears that she made a gift of the property to the man with whom she cohabited, and had made him the owner of it, the Bailiff would then have a right to seize it as against that man: *Edwards v. Farebrother*, 2 M. & P. 293.

As one man's goods cannot be seized by a Bailiff to pay another man's debts, it follows that the goods of a testator in the hands of an executor cannot be seized and sold under an execution against the executor to satisfy a judgment debt due from the executor himself in his own right: *Farr v. Newman*, 4 T. R. 621; *Gaskell v. Marshall*, 1 M. & Rob. 132; *Fenwick v. Laycock*, 2 Q. B. 108; but if a *devastavit* has been committed by the executor and the goods have been converted to his own use the executor cannot take advantage of his own wrong, and justify his own conduct by saying that the goods are not his but his testator's: *Quick v. Staines*, 1 B. & P. 293.

An illegal seizure of goods under void process would not prevent the landlord's bailiff from afterwards executing a legal warrant, the subsequent valid seizure being in no way vitiated by the previous trespass: *Percival v. Stamp*, 9 Ex. 171;

*Hooper v. Lane*, 6 H. L. Cas. 443; but a sale of goods under second distress for rent might give no title: *Lyness v. Sifton*, 13 C. P. 19; *May v. Severs*, 24 C. P. 396.

It will be observed that there can, by the language of the Statute, on a claim being made by a landlord for rent be an interpleader: See *Bateman v. Farnsworth*, 29 L. J. Ex. 265; but it is not intended to protect the Bailiff where the resistance is to the writ itself, that is where the defendant objects to any execution of his own goods; for there the process itself properly executed would be the Bailiff's defence: *Fenwick v. Laycock*, 2 Q. B. 108.

If the Bailiff has sold goods which were in the possession of the execution debtor at the time of the sale as the ostensible owner, but which were in reality the goods of a plaintiff, who had let them to hire to such execution debtor, the Bailiff would not be liable to an action for the wrongful sale unless it appeared that some actual damage had resulted to the plaintiff from such sale: *Tancred v. Allgood*, 4 H. & N. 444, and that he had been prevented by the act of the Bailiff from recovering possession of his goods. *Ib.*

A Bailiff can only obtain possession under genuine process, so that if the process is feigned, forged, or simulated under which he acts, it is a mere nullity and affords no protection: *Hooper v. Lane*, 6 H. L. C. 443; but if good in form and genuine it is a protection though irregularly issued: Addison on Torts, 5th Ed. 646-647: *Andrew v. Marris*, 1

Q. B. 17; *Jones v. Williams*, 8 M. & W. 356; *Woolley v. Clark*, 5 B. & Ald. 746.

Should the Bailiff or other officer be sued for seizing the goods, application should be made by him for a stay of proceedings under section 210: Sinclair's D. C. Act, page 216 and cases there cited. The cases are not very clear as to when proceedings will be stayed. In some cases a stay was granted, in others the defendant was allowed to justify his action by plea.

In *Booth v. The Preston and Berlin Ry. Co.*, 6 U. C. L. J. 57, Hagarty, J., says in an application for stay of proceedings: "There may be some doubt as to the Judge's authority under the Act. My impression is that he has a right to do all that is just, proper and equitable under the circumstances." The object of the Statute is to protect the Bailiff or other officer from vexatious actions where he has made an honest attempt to execute the writ: *Winter v. Bartholemew*, 11 Ex. 704. The action, however, will only be stayed where the trespass complained of is in connection with the seizure of the goods. If a trespass to land was charged a stay of the action might not be granted: *Hollier v. Laurie*, 3 C. B. 334; *Cater v. Chignell*, 15 Q. B. 217; *Jessop v. Crawley*, 15 Q. B. 212; *Brunsdon v. Humphrey*, 14 Q. B. D. 141. But in *Smith v. Critchfield*, 14 Q. B. D. 873, a very strong opinion to the contrary was expressed by the Court.

In addition to the cases cited at page 216 of Sinclair's D. C. Act on the subject of staying proceedings in action against the officer, the reader is referred to the following: *Oliphant v. Leslie*, 24 W

U. C. R. 398; *Tinkler v. Hilder*, 4 Ex. 187; *Foster v. Pritchard*, 2 H. & N. 151; *Jones v. Williams*, 4 H. & N. 706; *Mercer v. Stanbury*, 25 L. J. Ex. 316.

As has been previously remarked, the right to have an action stayed does not apply to the purchaser of the goods from the Bailiff: *Hills v. Renny*, 5 Ex. D. 313, but in replevin against the officer the application can be made: *Caron v. Graham*, 18 U. C. R. 315; but it is not compulsory upon him in any case to make it: *Mann v. Buckenfield*, 2 L. M. & P. 60 *per* Erle, J.; *R. v. S. Eastern Ry. Co.*, 4 H. L. Cas. 471.

The provision made for Bailees and Carriers in interpleading does not seem to apply to the Division Courts: R. S. O. Chapter 54, section 24, nor would the Act of 44 Victoria (Ontario) Chapter 7.

(f) NEW TRIAL.

At one time there was no power to grant a new trial in cases of interpleader in the Division Court; *R. v. Doty*, 13 U. C. R. 398; and unless a new trial is moved for *within the proper time* now, the Judge's decision is irrevocable in such cases: *Mitchell v. Mulholland*, 14 L. J. N. S. 55; *Mossop v. Great Northern Railway Co.*, 16 C. B. 580, S. C. 17 C. B. 130; *Bell v. Lamont*, 7 P. R. 307; *Irving v. Askew*, L. R. 5 Q. B. 208, 211; *Smith v. Darlow*, 26 Ch. D. 605; *Death v. Harrison*, L. R. 6 Ex. 15; *Dodds v. Shepherd*, 1 Ex. D. 75; *Brown v. Shaw*, 1 Ex. D. 425; *Barker v. Palmer* 8 Q. B. D. 9.

Any one of the three parties may apply for a new trial; (1) the attaching or execution creditor; (2) the claimant; (3) the officer or Bailiff.

A landlord claiming rent would be a "claimant" within the meaning of the section.

The adjudication on the question of damages would be the subject of application for new trial.

As to the course of proceeding in an application for new trial, the reader is referred to the authorities collected at pages 138, 139, 271, 272, 307 and 320 of Sinclair's D. C. Act.

The application must be made "within fourteen days after the trial." The day of the trial would be excluded: *Young v. Higgon*, 6 M. & W. 49; *McCrea v. Waterloo M. F. Ins. Co.*, 26 C. P. 437, S. C. 1 App. R. 218; *Weeks v. Wray*, L. R. 3 Q. B. 212.

If the Judge should postpone his decision under section 106 then the fourteen days would begin to run on the day after the delivery of his judgment. Rule 142 (*f*). Sundays would be included as part of the time, and if the last day should happen to fall on a Sunday the application should be complete the day before. *McLean v. Pinkerton*, 7 App. R. 490; Sinclair's D. C. Act, 1880, pages 19 and 46.

The absence, negligence or omission of the Clerk would not prejudice the application. *Ib. Ex parte Luxon, In re Pidsley*, 20 Ch. D. 701.

On an application for new trial the Judge has not power to set the verdict aside and enter a judgment for the unsuccessful party. All that he can do is to grant a new trial and send the case to another trial. The provisions of the O. J. Act allowing that to be done in the High Court do not apply to the Division Courts.

The application should show the *grounds* of

application, that is, must disclose such facts as would warrant an interference with the judgment, or shew that it should not in law be upheld.

The same language is to be found in the 3rd sub-section of section 79 of the Division Courts Act, and the cases cited at page 101 of Sinclair's D. C. Act will have equal application to the words here used. Also, see *Moore v. Hicks*, 6 U. C. R. 27; *R. v. Baker*, 6 C. P. 68; *Vidal v. Bank of Upper Canada*, 24 U. C. R. 430; *Dougall v. Wilson*, 24 U. C. R. 433; *Watt v. Barnett*, 3 Q. B. D. p. 185; *Smith v. Dobbin*, 37 L. T. N. S. 388, S. C. 37 L. T. N. S. 777.

As to the principles on which new trials will be granted the reader is referred to the works and authorities cited at page 69 of Sinclair's D. C. Law, 1884, and to The Ontario Digest, (1883) 498-507.

The general rule is that a new trial should not be granted unless the Court sees that the verdict or judgment is wrong, and where the action is tried by the aid of a jury the Judge "must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury in finding for the other party have either wilfully disregarded the evidence or failed to understand and appreciate it," to warrant him in granting a new trial: *Connecticut Mut. Life Ins. Co. v. Moore*, 6 App. Cas. p. 656; *Keena v. O'Hara*, 16 C. P. 435; *Canada Central Ry. Co. v. McLaren*, 8 App. R. 564-568; *Solomon v. Bitton*, 8 Q. B. D. 176; *Chard v. Jervis*, 9 Q. B. D. p. 181; *Jenkins v. Morris*, 14 Ch. D. p. 684; *Arthur v. Lee*, 8 C. P. p. 181.

A new trial will seldom be granted where on the trial the question in issue really was whether a crime had been committed by either party, because that would in effect be trying a man twice for the same offence: *Wilson v. Hill*, 5 O. S. 56; *Walbridge v. Follett*, 2 U. C. R. 280; *Edgar v. Newell*, 24 U. C. R. 215; *Gould v. The British America Ass. Co.*, 27 U. C. R. 473; *Commercial Bank, Midland District v. Denison*, 1 U. C. R. 13; *McLaren v. Muirhead*, 3 U. C. R. 59; *Maclem v. Dittrick*, 7 U. C. R. 144; *Ray v. Blair*, 12 C. P. 257; *McCulloch v. The Gore District M. F. Ins. Co.*, 34 U. C. R. 384; *Dear v. Western Ass. Co.*, 41 U. C. R. 553; *Frey v. Mut. F. Ins. Co. of Wellington*, 43 U. C. R. p. 113; *Moser v. Snarr*, 45 U. C. R. p. 428.

But under exceptional circumstances a new trial has sometimes been granted in such cases: *McMillan v. Gore District Mut. F. Ins. Co.*, 21 C. P. 123; *Canadian Bank of Commerce v. McMillan*, 31 U. C. R. 596; *Hand v. Agnew*, 32 U. C. R. 559.

(g) JUDGE MAY IMPOSE TERMS.

The usual power to impose terms on granting a new trial is here conferred on the Judge.

This is a discretion which should not be exercised arbitrarily, but according to the principles of reason and justice, and with a due regard to the rules of law applicable to such cases: *Sinclair's D. C. Law* 1884, 11, 13.

Where a new trial is granted as a matter of right, as in the case of misdirection of the Judge, terms will not be imposed: *Harborough v. Shardlow*, 8 M. & W. 264; but if witnesses are infirm or going beyond the sea or have died, the Judge may



impose the terms that those alive may be examined upon interrogatories, or that the evidence, if any, may be read from the notes of the first trial: *Doe, Gilbert v. Ross*, 7 M. & W. 102; *Anon.* 2 Chitt. 425; *Anon.* 1 D. & L. 725; *Gass v. Colcleugh*, E. T. 3 Vict., on granting a new trial.

The terms of producing deeds, books, papers and the like, may be imposed, or that certain facts not intended to be litigated may be admitted: *Thwaites v. Sainsbury*, 7 Bing. 437; or that the party make discovery of certain facts on oath.

Where an action was carried on by a bankrupt for the benefit of his creditors, the Court refused a new trial unless the assignees would consent to be bound by the event of the action and to be responsible for the costs: *Noble v. Adams*, 7 Taunt. 59.

Where the plaintiff submits to an erroneous non-suit, or where it is a matter of right by reason of the misdirection or other mistake of the Judge, or the like, payment of costs will not be imposed: *Vale v. Bayle*, Cowp. 297; *Jackson v. Duchaire*, 3 T. R. 553; *Goodright v. Saul*, 4 T. R. 359; *Macclesfield v. Bradley*, 7 M. & W. 570, in granting a new trial.

If granted because the verdict is contrary to evidence, the costs of the first trial should abide the event; so also where the new trial is granted for misconduct of the jury: *Hale v. Cove*, 1 Strange 642; *Hodgson v. Barvis*, 2 Chitty 268; *Shillitoe v. Claridge*, 2 Chitty 425.

If a party has obtained a verdict by a trick a new trial will be granted without costs, or perhaps in a very gross case the Court will oblige him to pay

the costs : *Anderson v. George*, 1 Burr. 352 ; *Trubody v. Brain*, 9 Price 76.

If the successful party had a material witness concealed in his house, and prevented him being served with a subpoena, it would be granted without costs : Arch. Pract. 12th Ed. 1542.

If a new trial is granted on the ground of surprise, not fraudulent, it should be on payment of costs. *Ib.* \*

If an order for a new trial is made without anything being said as to costs, each party has to pay his own costs of the first trial : *Eccles v. Harpur*, 3 D. & L. 71 ; *Newberry v. Colvin*, 2 Dowl. 415.

Not unfrequently costs are made to abide the event. In *Jones v. Williams*, L. R. 8 Q. B., Blackburn, J. says at page 283 : " The phrase, costs to abide the event, a term well known to the law for a long time, means if the event is the same to the party who had the verdict at the former trial, the party gets his costs, and if the event is not the same, the costs of the first trial are thrown away." But to provide against the contingency of the verdict not being the same, and if the Judge desires to give the costs of both trials to whoever may be successful on the second trial, then some such words as these should be used : " with costs to the successful party on the second trial," or " with costs to the successful party in any event."

Where costs are simply ordered to abide the event, the rule in regard to them is laid down at pages 1542-1543 of Archbold's Practice, 12th Edition, as follows :—" Where the costs are ordered to abide the event of the second trial, if the same party

succeed on both trials, he shall have the costs of the first as well as the second ; but otherwise the costs of the first shall not be allowed. And where the defendant obtained a rule for a new trial, the costs to abide the event, and the plaintiff then discontinued the action, it was held that the defendant was not entitled to the costs of the trial. Where, however, the second trial was granted on the application of the plaintiff on account of the smallness of the damages and the costs were to abide the event, and the plaintiff at the second trial obtained only the same amount of damages, he was held entitled to the costs of the second trial only. By 'the event of the second trial' is meant the ultimate event of the cause : and, therefore, if the verdict at the second trial be set aside, and on the third trial the ultimate event be the same as on the first trial, the party will be entitled to the costs of the first trial. After a verdict for a defendant, the Court made a rule absolute for a new trial, and ordered that the costs of the former trial should abide the event of such new trial : the record was carried down to the Spring Assizes following, and made a remanet ; it was tried a second time at the Summer Assizes, when a verdict was again found for the defendant ; the Court afterwards ordered that the verdict should be set aside, and a new trial had between the parties, upon the payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial ; upon the third trial a verdict was found for the plaintiff ; and the Court held, that the plaintiff was entitled to the costs occasioned

by the cause having been made a remanet at the Assizes next following the term when the first rule was made absolute for a new trial."

"Where on the first trial of a cause the plaintiff obtains a verdict, and a rule is afterwards made absolute, for a new trial, "The costs to abide the event," and the defendant succeeds on the second trial, neither party is entitled to the costs of the rule for a new trial."

Where the question of costs is reserved by the Judge until after the second trial, it will then be entirely in his discretion to allow the costs of the first trial to the successful party or not: *Body v. Esdaile*, 3 Bing. 174; *Hunter v. Caldwell*, 10 Q. B. 83.

Where a new trial is granted on payment of costs these do not include the costs of the summons, service, or such proceedings, but only such costs as are necessarily incurred in preparing for the trial of the cause, and the trial of it: *Lord v. Wardle*, 6 Dowl. 174; and the costs of opposing the application: *Eyre v. Thorpe*, 6 Dowl. 768; *Delisser v. Towne*, 1 Q. B. 333.

In the Division Court, costs, with rare exceptions (section 180) are in the discretion of the Judge, and should by him be ordered by or to whom payable or apportioned: *Sinclair's D. C. Act*, 171; and except where the Statute otherwise declares in the absence of such order each party must pay his own costs: See *MacLennan's Judicature Act*, 523-530.

Where a new trial is granted as of right on one point of the case, it opens up the whole case: *Macclesfield v. Bradley*, 7 M. & W. 570.

Where one of the plaintiff's witnesses lived at a

distance it was imposed as a condition that his evidence given at the last trial should be read from the Judge's notes : *Conley v. Lee*, 12 U. C. R. 456.

In a verdict for defendant clearly against evidence on one part of the case, a new trial was granted unless the defendant consented to a verdict for the plaintiff on that part of the case : *Anderson v. Todd*, 3 U. C. R. 16.

In *Dove v. Dalby*, 5 U. C. R. 457, a new trial was granted on terms of the defendant paying into Court or securing the amount of the verdict and costs of the former trial by a day named.

When the question for trial depends on established rules of law, and the finding is in opposition thereto, the party injured is entitled to a new trial without costs : *Logan v. Ryan*, 10 U. C. R. 15.

The plaintiff having died pending an application for new trial, it was made a condition that in the event of a second verdict for plaintiff, judgment should be entered as if such verdict had been rendered at the time of the first trial : *Swan v. Clelland*, 13 U. C. R. 335.

In an action for taking goods, the jury having found a general verdict for defendant, the Court granted a new trial to the plaintiff on his undertaking to restrict himself at such trial to a certain portion of the property as to which they thought the evidence in his favour : *Townsend v. Hamilton*, 5 C. P. 230.

Where the damages given were complained of as being too small, a new trial was granted, with costs to abide the event of the plaintiff's recovering more than the amount of the first verdict : *Jones*

v. *McDowell*, 12 U. C. R. 214; *Craig v. Corcoran*, 24 U. C. R. 406.

Where the evidence was not sufficient to go to the jury, but the attention of the Judge at the trial had not been drawn to the particular question, the costs on granting a new trial were ordered to abide the event: *Shaver v. Jamieson*, 25 U. C. R. 156.

In the case of *Commercial Bank v. Harris*, 27 U. C. R. 301, the Court refused to grant a new trial except upon condition of the defendant's withdrawing the plea of usury: S. C. 27 U. C. R. 526.

Where a plaintiff after argument of an application for non-suit or for a new trial on the ground of excessive damages, elects to reduce his verdict instead of submitting to a new trial with costs to abide the event, he is not entitled to the costs of opposing the application: *Floreys v. R. C. Bank*, 5 P. R. 257.

Costs were refused where the plaintiff had improperly written letters to the Court on the subject of his suit: *Thorpe v. Grier*, 1 U. C. R. 528.

It was made a condition on refusing a new trial that the plaintiff should assign to the Sheriff, who was the defendant, his interest in a certain mortgage, so that if possible the Sheriff might recoup himself: *Paterson v. Maughan*, 39 U. C. R. 371. See *R. v. Hart*, 45 U. C. R. 1.

The Court would not exercise the power of entering a verdict for defendant instead of granting a new trial where the action had been tried by a jury in the case of *Moore v. Connecticut Mut. L. Ins. Co.*, 6 Sup. R. 634; *Austin v. Davis*, 7 App. R. 478; and

the Division Court would not have the power to do so either.

Where a new trial is granted with costs to be "costs in the cause," this means the costs of the party who is successful in the cause: *Scott v. G. T. Ry. Co.*, 3 P. R. 276.

Costs, if any, of opposing an application to set aside an award are costs in the cause: *Corporation of Essex v. Parke*, 12 C. P. 159.

The costs of a commission to take evidence in a foreign country form part of the costs of the cause: *Colborne v. Thomas* 4 Grant 169, provided the evidence taken under the commission is used: *Dominion, &c., Co. v. Stinson*, 9 P. R. 177.

If either party wants costs he should ask for them. *Gleddon v. Trebble*, 9 C. B. N. S. 367. *In re Peck* and *The Corporation of the Town of Galt*, 46 U. C. R. 211.

7. (1) Under the provisions of sub-<sup>Power of Judge to award damages.</sup> section 3 of section 210 of The Division Courts Act as amended by this Act, the Judge in said sub-section mentioned shall have power to adjudicate upon and award damages, even though the amount of the damages claimed, found or awarded should be beyond (h) the jurisdiction of a Division Court.

(2) In respect of any damages claimed, found, awarded or adjudicated upon, or of any order, judgment or finding under the provisions of said sub-section or of this section, there shall as to all parties concerned, be the same rights of defence and counter-claim, (i) and the same right of appeal, (j) including in all cases the right and liability to costs, as would exist under The Division



Courts Act, 1880, had an action or suit within the jurisdiction of a Division Court been brought or instituted to recover said damages.

(h) DAMAGES BEYOND THE JURISDICTION.

The object of this section evidently is to give the Judge full power to try the question of damages no matter to what amount such damages may be. A somewhat analagous provision is to be found in the 78th section of the Ontario Judicature Act. The Division Courts have jurisdiction now :

(1) In all personal actions where the amount claimed does not exceed \$60 : D. C. Act, section 54, sub-section 1 ; D. C. Act, 1880, section 3.

(2) All claims and demands of debt account or breach of contract, or covenant or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed \$100 : D. C. Act, section 54, sub-section 2.

(3) All actions of replevin, where the value of the goods or other property or effects distrained taken or detained does not exceed \$60 : D. C. Act, section 56 ; D. C. Act, 1880, section 3.

(4) All claims for the recovery of a debt or money demand, the amount or balance of which does not exceed \$200, and the amount or the original amount of the claim is ascertained by the signature of the defendant or of the person whom as executor or administrator the defendant represents : D. C. Act, 1880, section 2.

(5) An action on any bond given in the course of any proceeding under the Division Courts Act, notwithstanding the penalty contained in such bond may exceed \$100: D. C. Act, section 207. Ordinarily the penalty of the bond is the test of jurisdiction: *McKelvey v. McLean*, 34 U. C. R. 635.

(6) Any right of action enforceable in the Division Court by virtue of special legislative enactment: R. S. O. Chapter 120, s. 12; R. S. O. Chapter 144, s. 24; R. S. O. Chapter 174, ss. 136, 207; R. S. O. Chapter 198, s. 8; R. S. O. Chapter 199, s. 10; 41 Victoria (Ontario), Chapter 12, and any other Statute that now or hereafter may confer jurisdiction.

(7) Counter-claim, even if beyond the jurisdiction of the Division Court: O. J. Act, s. 78; *Davis v. The Flagstaff Silver Mining Co. of Utah*, 3 C. P. D. 228; *Neald v. Corkindale*, 4 Ont. R. 317.

(8) Claims for damages arising from seizure of goods triable with interpleader issue: D. C. Act, 1885, s. 7.

(i) RIGHT OF DEFENCE AND COUNTER-CLAIM.

All parties interested in the question of damages and the adjudication thereon under the next previous section of this Act have the same right of defence and Counter-claim as they would have if an action or suit within the jurisdiction of a Division Court had been brought to recover such damages. The right of defence here referred to means the right of any person against whom a claim for damages is made, whether he be officer, Bailiff or execution creditor, to defeat that claim by any means known to the law, and the nature of such defence must depend on the circumstances of

each particular case. The extent of such defence is only limited by the law, which affords an answer to all claims, actions, or suits preferred or brought by one person against another.

The right of Counter-claim in this Province is of comparatively recent creation, dating back only to the Ontario Judicature Act of 1881.

The character of Counter-claim and a short sketch of its history will be found at page 182 and the following pages of Sinclair's D. C. Law, 1884.

It is not here proposed to make any elaborate comment on the cases in England or this Province on the subject, but only to refer, as we have done, to what the writer has already said on that subject, and to the remarks of a learned writer on the Ontario Judicature Act.

It is also proposed to give a note of any cases decided since the publication of either of those works, on the subject of Counter-claim. See Sinclair's D. C. Law, 1884, pages 179-215 ; Maclellan's Judicature Act, 278-287, 290, 304-306, 313-315, 402.

Where a person is doing an act which if skilfully done would entitle him to reward, and an action is brought therefor, the defendant is entitled to set up by way of Counter-claim the damages which he sustained by reason of the negligence or misconduct of the plaintiff, or those performing the act for him : The Yan-Yean, 8 P. D. 147.

A third party also who has been brought into a suit cannot Counter-claim against the original plaintiff : *Eden v. Weardale Iron & Coal Co.*, 28 Ch. D. 333. A party on being sued attempted to Counter-claim for a debt alleged to be due by the

plaintiff and another party, but it was held he could not : *Eyre v. Moreing*, W. N. 1884, 58.

As to indemnity by third parties under the Ont. Judicature Act, the reader is referred to *Pontifex v. Foord*, 12 Q. B. D. 152 ; *Jacobs v. Brown*, W. N. 1884, 23 ; *Caister v. Chapman*, W. N. 1884, 31 ; *Jones v. Elderton*, W. N. 1884, 39 ; *Hutchison v. Colorado U. Mining Co.*, W. N. 1884, 40 ; *Flower v. Todd*, W. N. 1884, 47 ; *Jablochkoff Electric Light Co. v. McMurdo*, W. N. 1884, 94 ; *Speller v. British Steam Nav. Co.*, 13 Q. B. D. 96 ; *Finlay v. Scott*, W. N. 1884, 8 ; *Bank of Commerce v. Bank B. N. A.*, 10 P. R. 158 ; *Federal Bank v. Harrison*, 10 P. R. 271 ; *Porters v. Miller*, 31 W. R. 858 ; *Borough v. James*, W. N. 1884, 32 ; *Coles v. Civil Service Supply Ass.*, 26 Ch. D. 529 ; *Gloucestershire Banking Co. v. Phillips*, 12 Q. B. D. 533 ; *Jones v. Elderton*, W. N. 1884, 39.

The right to Counter-claim exists where a party under fraudulent representations purchases a partially useless article and gives a note therefor, and is sued on such note by the vendor : *Star Kidney Pad Co. v. Greenwood*, 5 Ont. R. 28.

Where a company is being wound up, a contributory cannot, in answer to an action by the liquidator for calls, counter-claim for damages against the company : *Govt. S. Invest. Co. v. Dempsey*, 50 L. J. Q. B. 199. See *Mersey Steel and Iron Co. v. Naylor*, 9 App. Cas. 434 ; *Lion Life Ass. Co. v. Atkinson*, W. N. 1885, 54.

To an action of ejectment the defendant was allowed to counter-claim for damages which he had sustained by reason of the plaintiff's trespass  
Y

upon the land : *Goring v. Cameron*, 21 L. J. N. S. 59.

In action by the purchaser of land against the vendor for return of the deposit, see *The London Land Co. v. Harris*, 13 Q. B. D. 540.

(j) RIGHT OF APPEAL.

The writer is unable to give satisfactory meaning to the language here employed in reference to the subject of appeal. The sub-section in question declares that "all parties concerned" in "the damages claimed, found awarded or adjudicated upon" shall have "the same right of appeal \* \* \* as *would exist* under the Division Courts Act, 1880, had an action or suit within the jurisdiction of a Division been brought or instituted *to recover said damages.*" Under the Act of 1880 there never was any right of appeal where unliquidated damages were sought to be recovered. That right was conferred by the Act of 1880, section 17, only in cases "wherein the sum in dispute upon the appeal exceeds one hundred dollars exclusive of costs." There could not be any sum in dispute above one hundred dollars except where the amount or original amount of the claim "was ascertained by the signature of the defendant or of the person whom as executor or administrator the defendant represents." According to the provisions of the 2nd section of the Division Courts Act of 1880, as remarked by Osler, J., in the case of *In re Turner v. Imperial Bank of Canada*, 9 P. R. 19, the right of appeal was only conferred by that section in cases under the extended jurisdiction created by that Act. The same view was expressed in *Cameron v. Allen*, 10 P. R. 192, where it was held that there

was no appeal from the decision of a Judge in a garnishee proceeding in the Division Court, and such is the law as to garnishment proceedings at the present time : *Sato v. Hubbard*, 6 App. R. 546 ; *Mason v. The Wirral Highway Board*, 4 Q. B. D. 459. As will be seen by reference to 47 Victoria (Ontario), Chapter 10, section 9, an appeal is allowed in proceedings before a Division Court in an interpleader issue where the money claimed or the value of the goods or chattels claimed, or the proceeds thereof, exceeds \$100, and in all actions in which the parties consent to an appeal. Sinclair's D. C. Law, 1884, 44. But the sub-section under consideration in no way refers to the Statute of 1884 just quoted from, which is the only one allowing appeal in interpleader cases. It may be said that the words "rights of defence and Counterclaim" also here spoken of are also controlled by the reference to the Division Courts Act of 1880. Not so, however, these words being surplusage, for the right of defence exists by common law and Statutory enactments, and the right to Counterclaim in a Division Court "shall as regards all causes of action within its jurisdiction" be as extensive as in the High Court of Justice : O. J. Act, section 77.

But as the right of appeal is of Statutory creation : Sinclair's D. C. Act, 1880, 36 ; Sinclair's D. C. Law, 1884, 45 ; it should not be left to intentment. As remarked in Paley on Convictions : "A right of appeal must be given by express enactment, and cannot be extended by an equitable construction to cases not distinctly enumerated" :

*R. v. Stock*, 8 A. & E. 405; *R. v. Recorder of Bath*, 9 A. & E. 871; *R. v. Recorder of Ipswich*, 8 Dowl. 103, *ante* p. 17.

Again, this part of the section was intended to mean something, and it would be the duty of Courts to give to it if possible that meaning which would best effectuate the intention of the legislature. In *Ex parte Walton*, *In re Levy*, 17 Ch. D. 746, it was held that a Statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention.

It must be left to the Court of Appeal to decide what cases, if any, are the subject of appeal under this sub-section; the writer does not attempt to do so.

8. In all cases not already provided<sup>Notices to be in writing.</sup> for, where, in any suit or proceeding in a Division Court, it is necessary for any party thereto to give notice to any other party thereto or to the Clerk of the Court such notice shall be in writing (*k*).

(*k*) NOTICES TO BE IN WRITING.

In many cases in Division Court practice in respect to notice, verbal notification was sufficient.

As has been already remarked at pages 17-22, *ante*, where a Statute simply prescribes notice to be given to any person, it has been clearly established that verbal notice is sufficient.

In order to render written notice necessary, statutory enactment or some other authority having the force of law must so declare it.

In the High Court of Justice the giving of notice is provided for by the 451st Rule. It is there declared that "all notices required by these (O. J. Act) Rules shall be in manuscript or print, or partly in manuscript and partly in print, unless expressly authorized by a Court or Judge to be given orally." Under the Common Law Procedure Act all notices were by Rule of Court 131 required



to be "in writing." Under that Rule notices partly printed and partly written were always considered good, and would be so under this section.

If any section of any of the Division Courts Acts prescribes that written notice may be given in any particular way, then this section would have no application in such case.

The uncertainty of depending on verbal notice in legal proceedings was no doubt the reason why the legislature interposed and made written notice necessary.

Any party to a suit, or the Clerk of the Court, would be justified in disregarding any notice but such as this section requires to be given. The language is imperative and cannot be disregarded : See 5 L. J. N. S. 114.

9. (1) To remove doubts (*l*) it is hereby declared that in any action, suit or proceeding against any person as the surety of any Clerk or Bailiff of a Division Court, the entries in the books required by law to be kept (*m*) or which were so kept by any such Clerk or Bailiff shall be *prima facie* evidence against any such surety.

(2) For the purposes of this section the words "Clerk or Bailiff of a Division Court" shall be held to include any person who having been a Clerk or Bailiff of a Division Court has ceased (*n*) to be such Clerk or Bailiff

(*l*) REMOVE DOUBTS.

As the section declares, the object of the legislature has been to remove doubts as to the admissibility of entries in the books kept by a Division Court Clerk or Bailiff in an action against his sureties on their statutory covenant.

In an action against the Clerk or Bailiff himself of course no question could arise, for it is one of the clearest rules of evidence that entries made by a person in the ordinary course of business is the strongest testimony that could be adduced against him. But in the case of the surety the admissibility of the entries as evidence against him has been asserted by some Judges and questioned by others.

The case of *Middlefield v. Gould*, 10 C. P. 9, was an action against the sureties of a Division Court Clerk on their covenant, for not paying over moneys to his Bailiff which the latter was entitled to. At the trial the Procedure Book of the Clerk was produced and an entry of the Clerk there made was received in evidence. It was in these words: "Settled with Bailiff and balanced all costs up to this suit: amount due Bailiff £40." A motion was made for a new trial on the ground of the improper reception of this entry as evidence against the sureties, and was refused. In delivering the judgment of the Court, Richards, J. says at page 14: "In the case before us the entries were made by the Clerk from day to day in discharge of the duties of his office, and the Statute under which he was appointed requires the making of such entries on general principles; therefore I am of opinion that entries so made can be received in evidence against the defendants." In the case of *The Carmarthen and Cardigan Ry. Co. v. The Manchester and Milford Ry. Co.*, L. R. 8 C. P. 685, Bovill, C. J., in speaking of the liability of sureties on admissions made by their principal, says at page 691: "I have had some experience both at

the bar and on the bench, and I never heard it doubted that an admission by a principal is not evidence against a surety." The case of *Murray v. Gibson*, 28 Grant 12 is instructive on the question of the admissibility of entries made in books by a principal in an action against his sureties. A person had been appointed treasurer of a loan and savings society, which society had been incorporated by several acts of the legislature. He was also appointed its manager, the duties of which were similar to those of treasurer, the name of manager being given simply as one of honor, and did not involve any additional duties. Default was made by the person so appointed treasurer and manager, and an action was brought against the sureties on a bond given for the faithful performance of the duties which devolved on him as treasurer. At the hearing it was contended for the plaintiff that the entries made in office books by the treasurer could be received in evidence against the sureties.

The entries so made were not received as evidence in the case. Chancellor Spragge remarked at page 21 of the report: "Mr. Boyd contends that the entries in the office books by Gibson (the treasurer) are evidence against his sureties, and cites *Middlefield v. Gould*, 10 C. P. 9; but in that case the person making the entry was dead when the evidence was offered."

"It might not be unreasonable to extend the rule so as to admit the evidence where the person making the entry has absconded and his evidence cannot be procured; but I find that such evidence

was offered and refused in *Stephen v. Gwenap*, reported in 1 Moo. & Rob., page 120."

"It is clear as a general rule that it is only where the person making the entry is dead that the entry itself is evidence."

In the case of *Victoria Mutual Fire Ins. Co. v. Davidson*, 3 Ont. R. 378, Justice Burton questions the correctness of the law in *Middlefield v. Gould*, 10 C. P. 9, but in *The Corporation of Welland v. Brown*, 4 Ont. R. 217, the authority of *Middlefield v. Gould* was recognized by the Common Pleas Division, and it was there held that entries made by a town collector of taxes on his roll, in the discharge of the duties of his office as such collector, of taxes paid to him, were evidence against his sureties. It does not appear from the report of this case whether the principal was alive or not, and the same may be said of *Middlefield v. Gould*, notwithstanding the remarks in *Murray v. Gibson*, 28 Grant, 12, to the contrary.

In England the question came up for decision at a comparatively recent date (1881) in the case of *Ex parte Young, In re Kitchin*, 17 Ch. D. 668. It was there held that in the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but that the surety was entitled to have the liability proved as against him in the same way as against the principal debtor.

The Court of Appeal there followed a decision of a Court of the State of New York of *Douglass v. Howland*, 24 Wendell 35. It will therefore be seen

how uncertain the law was in regard to the admissibility of entries of a Division Court Clerk or Bailiff as evidence in an action against his sureties, and the propriety of removing the doubts which existed, and which removal this clause of the Statute assumes to accomplish.

Whatever the state of the law may be on this question in regard to other sureties, in respect to this particular class this Statute appears to settle it.

It would be difficult to imagine a judicial proceeding of any kind on the Statutory Covenant which the words "any action, suit or proceeding" would not comprise or apply to.

All entries which a Clerk is required by law to make in his Procedure Book, when signed by him, are evidence on their mere production under section 37 of the D. C. Act. The attention of the learned Judge in the case of *Victoria Mutual Ins. Co. v. Davidson*, 3 Ont. R. 378, does not appear to have been called to that section.

(m) THE ENTRIES IN THE BOOKS.

The first alternative of the clause refers to such entries in the books of Clerk or Bailiff as are "*required by law to be kept.*"

Entries in other books would not come within the scope of this provision: *Preston v. Wilmot*, 23 U. C. R. 448; *Kero v. Powell*, 25 C. P. 448; *McLeish v. Howard*, 3 App. R. 503; *Pybus v. Gibb*, 6 E. & B. 911; *Victoria M. F. Ins. Co. v. Davidson*, 3 Ont. R. 378. But the latter alternative of the section declares that entries in books "*which were so kept by any*

such Clerk or Bailiff" shall be *prima facie* evidence against his surety.

It will therefore be seen that all entries made by a Clerk or Bailiff, not only in books which he is required by law to keep, but in any books that are actually kept by him in regard to Division Court matters, can be given in evidence in an action against the surety. Such entries are only made *prima facie* evidence of the facts to which they refer, which, like any other piece of *prima facie* evidence, can be controverted by testimony shewing the real facts of the case.

This section would apply to cases not only where the action is against the sureties themselves, but where they are sued with their principal as well. At common law the entries would be evidence against the person who made them, and this Statute renders them evidence also in an action against the sureties.

(n) CLERK OR BAILIFF OUT OF OFFICE.

If the first part of the section stood alone it would be questionable if it had application to any cases but those against the surety of a Clerk or Bailiff then in office: *Helps v. Eno*, 9 U. C. L. J. 302; *Maitland v. Globe Printing Co.*, 9 P. R. 370; but all doubts on that point are set at rest by the concluding part of the clause.

As to a Clerk or Bailiff ceasing to be such, see *Sinclair's D. C. Act, 1880*, 64, 66.

The following references may be of service in considering any question involving the relations of principal and surety to third parties and to each other: *Addison on Contracts*, 8th Ed.; *R. & J's*.

Digest, 3027, 4678 ; Ontario Digest, 651 ; Law Reports Digest (1880), 3360, 4135 ; Law Reports Digest (1883), 813 ; Fisher's Digest, 8268, 9735 ; *In re Arcedeckne*, *Atkins v. Arcedeckne*, 24 Ch. D. 709 ; *In re Sherry, London & County Banking Co. v. Terry*, 25 Ch. D. 692 ; *The Cosgrave Brewing and Malting Co. v. Starrs*, 5 Ont. R. 189 ; *Verratt v. McAulay*, 5 Ont. R. 313 ; *Devanney v. Brownlee*, 8 App. R. 355 ; *Ward v. National Bank of New Zealand*, 8 App. Cas. 755 ; *Palmer v. Baker*, 23 C. P. 302 ; *Lloyd's v. Harper*, 16 Ch. D. 290 ; *Van Wart v. Carpenter*, 21 U. C. R. 320 ; Sinclair's D. C. Act, 25.



10. Where in a Division Court any <sup>Postpone-  
ment of  
trial.</sup> action or suit is being tried (o) by a jury, the Judge, if he thinks it expedient for the interest of justice, may postpone or adjourn the trial for such time and upon such terms, if any, as he shall think fit.

(o) TRIED BY A JURY.

The expression which is here used, "any action or suit is *being tried* by a jury," is somewhat indefinite. Do these words mean that the action or suit must be in course of trial, that a jury must actually be sworn and the trial of the cause proceeding before the Judge can postpone or adjourn the trial, and impose such terms as he shall think fit, or do they mean that the section has application to cases where the suit is coming on for trial at a particular sittings, and that before the jury is sworn or the trial of the cause is entered upon, application is made for a postponement?

The object of the section could scarcely be to give the Judge power to adjourn the hearing of the cause only, because that power was already vested in him by the 83rd section of the Division Courts Act. It is there declared that the Judge

may adjourn the hearing of the cause "upon such conditions as to the payment of costs and admission of evidence or other equitable terms, as to him seems meet."

The amendment here made was evidently intended to give the Judge power in cases where a jury is summoned, and the case is coming on for trial, though the jury is not actually sworn, to adjourn the trial, and to impose on a party applying for adjournment the payment of the fees of jury-men who have been summoned and attended: See *R. v. Hart*, 45 U. C. R. 1; *Willmott v. Barber*, 17 Ch. D. 772.

By the 47th section of the Division Courts Act of 1880 such fees are borne by the County, and a doubt probably arose whether a Judge had the power to impose the payment of *such* fees in addition to the ordinary costs as between party and party as one of the terms of adjournment: *Sinclair's D. C. Law*, 1884, pp. 223, 224.

It may be urged that the section in question does not confer any greater power on the Judge than he possessed under the 83rd section of the General Act and Rule 141, but the intention of the legislature surely must have been to extend the authority of the Judge. He is empowered to "postpone or adjourn the trial for such time and *upon such terms*, if any, as he shall think fit." It is submitted that the words which we have italicised are sufficiently comprehensive to confer on a Judge the power of imposing the payment of jury fees on an applicant for postponement or adjournment of a trial.

As has been asked in a previous part of this note, what is the meaning of the words "being tried by a jury?" It is submitted that the Judge would have the power to "postpone" a trial under this section even though the jury had not been sworn or the trial otherwise entered upon, that these words really mean "*about to be tried*" or "*coming on for trial*" at a particular sittings, and do not limit the power of the Judge only to cases where the Jury has been sworn: See *Pierpoint v. Cartwright*, 42 L. T. N. S. 259.

It will be observed that the words "postpone or adjourn" are both used. A trial is said to be "postponed" where it has been put off before being entered upon, and "adjourned" where the trial is deferred after its commencement: Har. C. L. P. Act, 290, 291. A Judge may in the language of this section consider it "expedient for the interest of justice" that the trial of a cause should be postponed, yet not be willing or consider it just to impose on the taxpayers of a county the payment of jury fees in such a case.

The discretion which this section confers on the Judge should be exercised upon those principles which regulate the conduct of all judicial officers where discretionary powers are conferred, and so aptly defined by Sir James Maxwell in his work on the Construction of Statutes, p. 100: Sinclair's D. C. Law, 1884, pages 11, 13; *Wilson v. Church*, 9 Ch. D. p. 558.

When an order for postponement of a trial is made on terms, the party in whose favor the postponement is granted, having acted upon it, or

taken advantage of its provisions, is bound by its terms and cannot repudiate any part of it: *Griffin v. Dickenson*, 7 Dowl. 860; *Giraud v. Austen*, 1 Dowl. N. S. 703; *King v. Simmonds*, 7 Q. B. 289; *McKenzie v. Stewart*, 10 U. C. R. 634.

So that if a party asked for a postponement of a trial and obtained it on payment of jury fees as well as other costs, he would be bound to pay them, for he could not take the benefit of the order for postponement without its burthen: *Richardson v. Shaw*, 6 P. R. 296. To use the words of Tindal, C. J., in *Giraud v. Austen*, 1 Dowl. N. S., at page 704, the party "would set up his own non-performance of the condition in order to get rid of that which is the consequence of his own act." See also *Martin v. McCharles*, 25 U. C. R. 279. The words "upon payment of costs" are words of agreement, not mere words of condition, and execution may be issued upon an order in these words: *Stuart v. Branton*, 9 P. R. 566.

A Judge could open again an order for adjournment granted by himself, or even rescind it before it was acted on, upon his discovering that he had made it inadvertently, or had been surprised into making it by any perversion or concealment of facts, or from the misconception on his part of the law or facts: *Shaw v. Nickerson*; *Gillespie v. Nickerson*, 7 U. C. R. 541; *Hughes v. Field*, 9 P. R. 127.

So long as an order stands unreversed it will be assumed that neither party is dissatisfied with it: *Hall v. Brown*, 3 P. R. 293. If there should be any objection to the mode of compliance with a Judge's

order application should be made to the Judge, who made it for correction: *Ross v. Grange*, 4 P. R. 180. Any order made under this section need not be drawn up or served, but should be entered by the Clerk in the Procedure Book: Rule 149. If the order do not prescribe when fees or costs are to be paid the party would have fifteen days from the rendering of the decision granting postponement in which to pay: Rule 149.

Where consent is given to the making of an order, such consent cannot be arbitrarily withdrawn: *Harvey v. Croydon Union Rural Sanitary Authority*, 26 Ch. D. 249.

11. (1) Every summons or process issued out of a Division Court against a corporation not having its chief place of business (*p*) within the Province, and all subsequent papers and proceedings in the action, suit or proceeding in which said summons or process has been issued, may be served on the agent (*q*) of such corporation whose office or place of business as such agent is either within the division in which the summons or process issued, or is nearest thereto.

Service of  
process, etc.,  
on corpora-  
tions.

(2) For the purposes of this section the word "agent" (*r*) shall be held to include,

(*a*) In the case of a railway company any stationmaster having

charge of any station belonging to such railway company ;

(b) In the case of a telegraph company, any person having charge of any telegraph office belonging to such telegraph company, and

(c) In the case of an express company, any person having charge of an express office belonging to such express company.

(p) CHIEF PLACE OF BUSINESS.

The provisions of this section are intended to meet a class of cases that frequently arise in practice. Many people having small claims against corporations whose chief places of business are not within this Province have been virtually denied their rights by reason of the inability to obtain redress in our Division Courts. To resort to the higher Courts would be too expensive for them. Hitherto there has been no provision by which in ordinary actions in the Division Court against such corporations service of process could be effected : *Re Ahrens v. McGilligat*, 23 C. P. 171 ; *Westover v. Turner*, 26 C. P. 510 ; *In re Guy v. G. T. Ry. Co.*, 10 P. R. 372 ; *Berkley v. Thompson*, 10 App. Cas. 45 ; *Ontario Glass Co. v. Swartz*, 9 P. R. 252 ; *R. v. Lightfoot*, 6 E. & B. 822. By the 2nd, 3rd and

4th sections of the Division Courts Amendment Act of 1884—Sinclair's D. C. Law, 1884, 17, 43—provision was made for the service of garnishment proceedings against such corporations, and by the section of this Act now under consideration, the legislature has gone much further, and made provision for the service of "every summons or process issued out of a Division Court against said corporations."

In the work just referred to the writer discussed the meaning of the term "chief place of business," and refers thereto for the meaning which in his opinion is to be attached to the expression.

The following additional authorities may be referred to with advantage :

Where a corporation appointed a general agent to do business in a place, it was held that it did not do business at such place : *Corbett v. The General Steam Navigation Co.*, 4 H. & N. 482.

A railway company was held not to "carry on business" at a receiving house or a booking office kept by an agent for the receipt and booking of packages for all the railways generally ; *Minor v. L. & N. W. Ry. Co.*, 1 C. B. N. S., 325.

A surgeon and apothecary was held to "carry on business" where he daily attended patients, although resident elsewhere : *Mitchell v. Hender*, 18 Jur. 430.

A clerk to the Privy Council was held not a person who "carried on his business" at the Privy Council : *Sangster v. Kay*, 5 Ex. 386. In the case of *Rolfe v. Learmonth*, 14 Q. B. 199, the words "carries on business" were said by Coleridge, J., to mean



“some fixed place at which the party's business is carried on, at least for a certain time.”

In *Shields v. The Great N. Ry. Co.*, 7 Jur. N. S. 631, it was held that where a railway company had their principal office in London for the regulation and guidance of their undertaking in the various places through which their railway passed, and had a station at A, that they carried on their business at London and not at A.

A railway company was held to carry on its business where the general superintendence and management of the business took place: *Rogers v. L. C. & D. Ry. Co.*, 26 W. R. 192.

In the case of *In re Guy v. G. T. Ry. Co.*, 10 P. R. 372, before this Act, the defendants, having their head office in Montreal, were held not defendants residing or carrying on business in this Province; but although the service on a station agent was void, that having appeared at the trial, they waived the objection.

(q) SERVICE ON THE AGENT.

If an agent, such as the Statute declares or contemplates, has an office or place of business *as such agent* within the division in which the summons or process issued, then the same and all subsequent papers and proceedings in the action, suit or proceeding may be served on such agent; but if any such agent is not to be found, then on such agent as has his office or place of business *as such agent* nearest to such division—that is to the nearest point on the boundary of such division: *Sinclair's D. C. Law*, 1884, 37.

The distance would not be measured by the

travelled road, but in a straight line on the horizontal plane, or, as popularly expressed, "as the crow flies": *Mouflet v. Cole*, L. R. 7 Ex. 70; L. R. 8 Ex. 32; Sinclair's D. C. Law, 1884, 28-32.

It will be observed that the distance is to be measured from the office of the agent *as such* to the limit of the division of the Court out of which the summons or process issued.

The word "process" here used means, it is submitted, *any* proceeding in the nature of a summons issuing from a Court, under its seal, and whose object is to compel a corporation to answer in Court why an alleged right should not be enforced against it.

The expression "all subsequent papers and proceedings in the action," would, it is submitted, apply to service of papers required to be made after judgment as well as before: *Macdonald v. Farewell*, 5 C. P. 101.

An application for new trial, therefore, could be served in the same way as the summons in the cause.

As to what is a "proceeding," see *Meloche v. Reaume*, 34 U. C. R. 606; *Caspar v. Keachie*, 41 U. C. R. 599.

Although a corporation could be sued by a common informer for penalties, yet it could not sue as such without being empowered by Statute so to do: *Guardians, &c., v. Franklin*, 3 C. P. D. 377.

(r) THE AGENT TO BE SERVED.

The definition which the Statute here gives to the word "agent" is not intended to define the only class of agents that may be served. The

word is given by way of example and not as determining who only may be served as an agent.

Unless the corporation appears in the suit the Judge should be particular in having by affidavit or other evidence due proof of the proper service of the summons or other process before rendering judgment in the case.

A female, married or single, a minor, or an alien, could be an agent under this section. For a discussion of this subject see Sinclair's D. C. Law, 1884, 39-42, and *ante* page 106. In addition to those persons mentioned in the Statute the question of agency must depend on the circumstances of each particular case. The character and general purpose of the corporation and the nature and extent of its business must be considered for the determination of that question.

Generally speaking, he must not be a subordinate servant of the corporation, but one who may be considered the representative of the corporation at a particular place, and having his office or place of business there.

Substitutional service of the agent could not be ordered under the 62nd section of the Division Courts Act, 1880, for the provision here made is in effect substitutional service of the defendants.

The following is a form of affidavit of service of summons on an agent :

*(Court and Cause.)*

I, E. F., of &c., Bailiff of the      Division Court  
of the County of      (*or* of the above-mentioned  
Court), make oath and say :

1. That I did on the      day of      188   , duly

serve one G. H., as agent for the above defendants, with the within (*or annexed*) summons, notices, memorandum or warnings therein and thereon, in this cause, by delivering a true copy of each to and leaving the same with the said G. H. personally.

2. That at the time of such service the said G. H. was the stationmaster (or, *as the case may be*) of the above-named defendants at (*name of place*) and that at the said time he as such stationmaster (or, *as the case may be*) had his office (*or place of business*) at said place; that such office (*or place of business*) was at the time of such service within the division of the Division Court of the County of , and that I necessarily travelled miles to make such service.

Sworn, &c.

[If the summons or other process is necessarily served on some agent of the corporation whose office, or place of business is not within the division of the Court out of which such summons or process issued, then the affidavit should shew that such office, &c., is nearest to such division.]

R. S. O. c.  
47, s. 9  
amended.

12. Section 9 of The Division Courts Act is hereby amended by adding thereto the following as sub-section 3 thereof:

(3) Where a municipality, not being a town or city, furnishes (s) a Court room and other necessary accommodation for a Division Court as aforesaid, or pays any owner, lessee, or tenant, as aforesaid, for the use of any building, it shall be entitled to recover from any other municipality wholly or partly within the division for which such Court is held, such reasonable share of the cost of providing accommodation for holding the Court as shall in that behalf, be decided and ordered by the Judge of the said Court, to be paid and contributed by the latter munici-

pality; and in every such case the total cost of providing such accommodation for holding the Court shall be deemed to be five dollars for every day on which the Court is held

(s) The 9th section of the Division Courts Act will now read as follows:

"The municipality in which a Division Court is held shall furnish a Court room and other necessary accommodation for holding said Court, not in connection with any hotel."

"2. In case a proper Court room, and other necessary accommodation for the holding of the Division Court are not furnished by the municipality in which the Court is held, the Judge may hold the Court in any suitable place in the Division, or in any other Division of the County in which suitable accommodation is provided; and the owner, lessee or tenant of the building in which the Court is so held, shall for the use of the said building be entitled to receive from the municipality whose duty it was to provide proper accommodation for the Court, the sum of five dollars for every day on which the Court is held in said building."

["3. Where a municipality, not being a town or city, furnishes a Court room and other necessary accommodation for a Division Court as aforesaid, or pays any owner, lessee, or tenant, as aforesaid, for the use of any building, it shall be entitled to recover from any other municipality, wholly or

partly within the division for which such Court is held, such reasonable share of the cost of providing accommodation for holding the Court as shall in that behalf, be decided and ordered by the Judge of the said Court, to be paid and contributed by the latter municipality; and in every such case the total cost of providing such accommodation for holding the Court shall be deemed to be five dollars for every day on which the Court is held."]

It will be observed that as the law previously stood the municipality in which the Court was *held* was obliged to furnish the Court room and necessary accommodation for holding the Court, or bear the expense of it: Sinclair's D. C. Act, p. 8; now, in all cases where a division comprises the whole or parts of two or more municipalities, not only is the municipality in which the Court is held but all others forming parts of the division are to bear a fair and proper share of the expense. The section does not apply to city or town municipalities.

As to what is necessary accommodation for the purpose of holding a Division Court, the reader is referred to the views the writer expressed at pages 7 and 8 of Sinclair's D. C. Act.

Before the municipality that seeks contribution under the Statute, for money disbursed by it, from the other or others, can recover, it is necessary that the expenses should be first paid. Anything short of that would not give any right of action. The payment, too, must be made to the owner, lessee or tenant of the building in which the Court is held.

It will be observed that the municipality which is liable under this section is only subject to a "reasonable share of the cost of providing accommodation for holding the Court." What that "reasonable share" is must depend on the circumstances of each particular case.

The Judge of the Court has to determine what that share is, and make his order accordingly.

It could not be done *ex parte*. The municipality alleged to be in default would have a right to be heard, and to shew cause why it should not pay the claim preferred: Sinclair's D. C. Act, 127, 133, 141, 155, 209 and cases cited.

As enunciative of this principle and in addition to the cases cited at the pages referred to, reference may be made to *Willis v. Gipps* 5 Moo. P. C. 379; *R. v. Cheshire Lines Committee*, L. R. 8 Q. B. 344; *Wood v. Woad*, L. R. 9 Ex. 190; *R. v. Collins*, 2 Q. B. D. p. 36; *Fisher v. Keane*, 11 Ch. D. 353; *Ex parte Tucker*, *In re Tucker*, 12 Ch. D. 308; *R. v. College of Physicians and Surgeons*, 44 U. C. R. 146; *Tunbridge Wells Local Board v. Akroyd*, 5 Ex. D. p.p. 201, 204, 211; *Briggs v. Briggs*, 5 P. D. 163; *R. v. Law*, 27 U. C. R. 260.

In support of the principle just mentioned reference may also be made to the eloquent language of Chief Baron Kelly, who at page 202 of 5 Ex. D. says: "I must say that it appears to me, not only a violation of one of the first principles of the law of England, but, also, neither more nor less than an outrage upon justice, to hold that a court of law, or an arbitrator, or any other tribunal in this country, can adjudge a man to lose his money or his



land without being heard or having the means of being heard in his defence." At page 204 of the same report the same learned Judge says: "The truth is that the Act of Parliament is so negligently and improvidently framed as to create great and formidable difficulties in carrying its provisions into execution. But this cannot justify the Board in setting at naught the first principles of the law and constitution of this country by seeking to recover in a court of law or equity, or before any other tribunal, the property of the subjects of the realm, without permitting them to appear and be heard in their defence."

The outside limit which *all* the municipalities would be called upon to pay as the total cost is five dollars per day, but part of a day would count as a whole day, no provision being made for a fractional part of a day, but only "for *every* day on which the Court is *held*."

The sum which each would have to pay would be small, yet the proportion should, if possible, be settled upon some principle of fair contribution.

It is submitted that population and assessed value of the whole or parts of the respective municipalities within the division would be a fair basis on which to estimate the reasonable share of each.

No particular method of collecting the amount due by the delinquent municipality is prescribed by the Statute, and in the absence of such it would seem that the proper proceeding would be an action in the Division Court: *Lees v. Corporation of Carleton*, 33 U. C. R. 409, and authorities there cited.

13. Section 24 of The Division Courts <sup>43 V., c. 8, s. 24 amended</sup> Act, 1880, is hereby amended by inserting therein after the word "officers" (*t*) the words "or other person or persons."

(*t*) The 24th section of The Division Courts Act, 1880, will now read as follows :—

"When the said Inspector considers it expedient to institute an inquiry into the conduct of any Division Court Clerk or Bailiff in relation to his or their official duties or acts, it shall be lawful for the said Inspector to require such Clerk or Bailiff or other person or persons to give evidence on oath, and for this purpose the said Inspector shall have the same power to summon such officers [or other person or persons] to attend as witnesses, to enforce their attendance, and to compel them to produce books and documents, and to give evidence, as any Court has in civil cases."

For a discussion of the section as it stood before this amendment, the reader is referred to Sinclair's D. C. Act, 1880, p. 61.

It will be observed that as the section now stands not only has the Inspector power in making inquiry into the official conduct of any Clerk or Bailiff to require such Clerk or Bailiff or any other person to give evidence on oath before him, and to summon

such officers to attend as witnesses, but he has also the further power of summoning such "*other person or persons*" to attend as witnesses, and to enforce their attendance, and to compel them to produce books and documents, and to give evidence, as any Court in civil cases has.

The extended power conferred by this section has no doubt been found by experience to be necessary for the proper investigation by the Inspector of the official conduct of Clerks and Bailiffs. The public interests demand that the fullest investigation should be allowed in such cases, and this provision is in furtherance of that object.

14. This Act shall be read and construed as part (u) of The Division Courts Act, and of any Acts amending the same.

Act to be  
read with  
R. S. O., c.  
47, and am-  
ending Acts

(u) PART OF OTHER DIVISION COURT ACTS.

This section incorporates this Act with all other Division Court Acts, thereby making it as much a part of them as if it had originally been part of Division Court legislation.

"Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit." Interpretation Act—Rev. Stat. Ont. Chapter 1, section 8, sub-section 38.

All Division Court Acts must be read as a whole, and their apparent inconsistencies harmonized, and their variances, if any, reconciled in all cases, with a view of promoting justice and right and preventing the commission of wrong. "Where the

language of an Act of Parliament will admit of two constructions, if one of them would lead to harshness or injustice, we may fairly infer that the other will give effect to the intention of the legislature, and adopt it in preference." *Per Williams, J.*, in *Whiley v. Whiley*, 4 C. B. N. S. p. 661.

15. This Act may be cited as The Di-Short Title.  
vision Courts Amendment Act, 1885. (*v*)

(*v*) THE AMENDMENT ACT OF 1885.

This Act is a part of the legislation of the year 1885 on the subject of Division Court law. There are parts of other Statutes to which reference will be made hereafter, more or less affecting the Division Courts, but this is the chief piece of legislation on that subject. Some of the sections, in view of recent decisions, may be unnecessary and some the writer fears may not fully accomplish the purpose which the framer intended. For instance, the late case of *Chadwick v. Ball*, 14 Q. B. D. 855, decided by the Court of Appeal in England on the first of April, 1885, overruling *Oram v. Brearey*, 2 Ex. D. 346, on which the case of *Clarke v. Macdonald*, 4 Ont. 310, in our Queen's Bench Division, was decided, would appear to render unnecessary the 1st section of this Act. In the above case of *Chadwick v. Ball*, 14 Q. B. D. 855, it was held that where the Salford Hundred Court of Record Act of 1868 enacts that "No defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the Court shall have jurisdiction for all pur-

poses;" the absence of such a plea gave the Court complete jurisdiction. This language it is submitted is no stronger in favour of concluding the question of jurisdiction by the want of a plea than does the 14th section of our Division Courts Act, 1880, by the absence of notice disputing the jurisdiction: See the remarks of Hagarty, C. J. in *Clarke v. Macdonald*, 4 Ont. R. 315, 316.

The language, too, of sub-section (2) of section 7 of this Act has, it is feared, for the reasons given in the notes to that sub-section, possibly failed to give an appeal which evidently the clause was intended to confer. But on the whole many salutary reforms are introduced by this Act, which it has been the earnest aim of the writer in the foregoing pages to elucidate and explain.

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AN ACT FOR FURTHER IMPROVING THE  
ADMINISTRATION OF THE LAW.

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(48 Victoria, Chapter 13, (Ontario.)

[Assented to 30th March, 1885.]

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Her Majesty, by and with the advice  
and consent of the Legislative Assembly  
of the Province of Ontario, enacts as  
follows :—

1. This Act may be cited as the Short Title.  
Administration of Justice Act, 1885.

[Sections 2 to 7, both inclusive, have no reference to  
Division Court proceedings.]

8. Where a writ of replevin is sued Indemnity  
of defend-  
ant in re-  
plevin pro-  
ceedings.  
out for any personal property which  
had not been previously taken out of  
the plaintiff's possession, and for which  
the plaintiff might bring an action of  
trespass or trover, the defendant shall  
be entitled, if the plaintiff fails in the



action, to be fully indemnified against all damages sustained by the defendant, including any extra costs which he may incur in defending the action ; and the bond to be taken by the Sheriff or Bailiff shall be conditioned, not only as heretofore required in that behalf but also to indemnify and save harmless the defendant from all loss and damage which he may sustain by reason of the seizure, and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges, and expenses which the defendant may incur, including reasonable costs not taxable between party and party : this section shall not apply to cases of distress for rent or damage-feasant.

THE OBJECT OF THE SECTION.

The intention of the legislature evidently has been to afford to those from whom, in certain cases chattel property has been wrongfully replevied, an

enlarged right as to the measure of damages recoverable in consequence of the replevin.

It is probable that the former state of the law as disclosed by the case of *Williams v. Crow*, 10 App. R. 301 was the reason for the enactment of this section.

It does not apply to cases of distress for rent or damage-feasant, that is "found doing damage:" See *Tillett v. Ward*, 10 Q. B. D. 17; *Buist v. McCombe*, 8 App. R. 598.

The words "for any personal property which had not been previously taken out of the plaintiff's possession" are somewhat difficult to understand.

Wherever an action of trespass or trover would be maintainable (except for distress for rent or damage-feasant) the defendant would be entitled to the benefit which this section confers should he succeed in the replevin action.

The defendant is to be indemnified "against *all* damages" sustained by him. This cannot be taken in its widest sense and be held to include all sorts of damage immediate or remote which the defendant has sustained. The words here used must mean that the defendant shall be entitled to recover such damages as would naturally flow from and be the reasonable consequence of being deprived of his property through the wrongful act of the plaintiff in replevying, whether the same may hitherto have been the subject of damage or not.

It may be stated further in general terms that whatever would be the subject of damage in an action of trespass or trover would be recoverable as damages under this section.

The damages should be assessed in the replevin suit : *Gibbs v. Cruikshank*, L. R. 8 C. P. 454.

All costs, charges and expenses which the defendant reasonably incurs, including costs not taxable between party and party, are allowable to the defendant.

A question will arise whether such costs, charges, and expenses are taxable in the replevin suit against the plaintiff, or whether they are recoverable on the replevin bond or otherwise. From the whole tenor of the section it would seem that they are not taxable as costs in the cause. The section declares that the defendant is to be "fully indemnified" against damages and extra costs, but it does not say that such shall be determined by any particular officer, or taxed against the plaintiff in the suit. The determination of them therefore should, according to the ordinary rules of Statutory construction, belong to the ordinary tribunals of the Province.

Deterioration of the property during the pendency of the replevin suit is also made the subject of damage in the event of the property being returned. There being no provision in the Replevin Act for the sale of perishable property, or property of a depreciable nature, such a provision is eminently necessary.

#### WHEN ACTION OF REPLEVIN LIES.

Replevin was defined by Chief Baron Gilbert to be the remedy given the party to controvert the legality of a distress in order to bring back the pledge to the proprietor in case the distress was unlawfully taken and without just cause.

Blackstone said, to replevy was where a person distrained upon applied to the Sheriff or his officers and had the distress returned into his possession, upon giving good security to try the right of taking it in a suit at law, and if that should be determined against him to return the cattle or goods once more into the hands of the distrainer.

Spelman defines a replevin as a justicial writ to the Sheriff, complaining of an unjust taking and detention of goods or chattels, commanding the Sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattels.

In the early history of replevin in England it was resorted to as a remedy for unlawful distress, but a proceeding so beneficial in its operation could not be confined within such narrow limits. In *Mellor v. Leather*, 1 E. & B., at page 628 Lord Campbell, C. J., says: "We are of opinion, upon the authority not only of the text books, but of decided cases, that replevin will lie when goods have been unlawfully taken, *though not as a distress*." The question whether replevin would lie in any case except for illegal distress again arose in *Mennie v. Blake*, 6 E. & B., 842, but was not decided. The general rule of law appears to be in most of the States of the American Union that replevin lies wherever one man claims goods as his own in the possession of another. This will appear by reference to the authorities cited at page 629 of the American Edition of 1 E. & B. In *Crawford v. Thomas*, 7 C. P., at page 68, and in *Miller v. Miller*, 17 C. P.,

226, the same question was touched upon but not decided.

But whatever the extent of the remedy by this form of action was at common law, our Statute, first enacted in the year 1851, and our law still, declares that wherever any goods, chattels, property or effects have been wrongfully taken or detained the owner or other person or corporation capable of maintaining an action of trespass or trover for personal property, may bring an action for the recovery of the damages sustained by reason of the unlawful taking and detention, or of the unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses : Rev. Stat. Ont., Chap. 53, section 2.

Wherever trespass is maintainable so also is the action of replevin : *Cook v. Fowler*, 12 U. C. R. 568 ; *Brown v. Zimmerman*, 15 U. C. R. p. 563. If neither trespass nor trover would be maintainable neither would replevin : *Caron v. Graham*, 18 U. C. R. 315 ; *Schaffer v. Dumble*, 5 Ont. R. 716 ; except in those cases where it would be maintainable at common law. *Id.*

Replevin will not lie for a chattel seized by a Collector of Customs for breach of the revenue laws, and if a writ issues therefor it will be set aside : *Scott v. McRae*, 3 P. R. 16.

Notwithstanding the provisions of the Municipal Act which prevents actions being brought for anything done under a by-law until such by-law has been quashed such Act applies only to suits for the recovery of damages, not to actions of

replevin : *Wilson v. The Corporation of Middlesex*, 18 U. C. R. 348.

In order to maintain the action against a lienholder, the lien must first be discharged or an offer or tender of the amount of the lien made : *Lake v. Biggar*, 11 C. P. 170.

Any person out of whose possession books, &c., have been taken, whether by force or fraud, or without right, may replevy under our Statute, but when the right to the custody and possession depends on the holding of an office, it should appear that the applicant holds the office and is therefore entitled to such books, &c. : *Hammond v. McLay*, 10 U. C. L. J. 269.

Under our law, replevin will lie though there has been no wrongful taking, but a detention merely, for every detention is a new taking : *Deal v. Potter*, 26 U. C. R. 578.

In replevin against one person, goods cannot be taken out of the peaceable possession of another without notice or demand : *G. W. Ry. Co. v. McEwan*, 28 U. C. R. 528.

A person in possession of goods may have no right against the true owner, yet may have a right to maintain replevin against a wrong-doer ; *Gilmour v. Buck*, 24 C. P. 187 ; *McDonald v. Lane*, 7 Sup. R. 462.

One who is entitled to possession of a chattel as agent of a foreign corporation, the owner of it, is entitled to maintain replevin in his own name : *Coquillard v. Hunter*, 36 U. C. R. 316.

Where an action of replevin is brought on the ground that the facts would sustain an action of

trover, the fact of conversion must be clearly established: *Smalley v. Gallagher* 26 C. P. 531.

A stranger whose goods have been distrained for rent on the premises of a tenant cannot in replevin any more than the tenant question the landlord's right to demise; *Smith v. Aubrey*, 7 U. C. R. 90.

A landlord is not liable in replevin for the illegal seizure by his bailiff of property not found on the demised premises: *Ferrier v. Cole*, 15 U. C. R. 561.

Replevin may be brought upon a distress for school rates, and notice of action is not necessary therefor: *Applegarth v. Graham*, 7 C. P. 171; *Spry v. McKenzie*, 18 U. C. R. 161; See also *Gillies v. Wood*, 13 U. C. R. 357; *Haacke v. Marr*, 8 C. P. 441.

Where a distress was made for rates, some of which were legally collectable, others not, it was held that replevin would not be maintainable for the seizure until after the payment of the rates legally collectable: *Corbett v. Johnston*, 11 C. P. 317; See also *Anglin v. Minis*, 18 C. P. at page 174. *per* A. Wilson, J. But the legal rate must *separately* appear on the collector's roll: *Hurrell v. Wink*, 8 Taunt. 369; *Sibbald v. Roderick*, 11 A. & E. 38; *Coleman v. Kerr*, 27 U. C. R. 5, 13; *Squire v. Mooney*, 30 U. C. R. 531; *Victoria Mut. F. Ins. Co. v. Thomson*, 9 App. R. 620; to justify the distress.

In replevin for goods seized as a distress for taxes it must distinctly appear that such goods are liable to distress in order to justify the seizure: *Sargant v. The City of Toronto*, 12 C. P. 185.

Distress was made for school taxes, which it was found had been illegally rated, it was held that

replevin was maintainable therefor: *Halpin v. Calder*, 26 C. P. 501; See also *Askew v. Manning*, 38 U. C. R. 345.

The plaintiff sold to one F. certain goods, taking notes in payment therefor, and a written agreement was entered into that unless the notes were promptly paid the property should not vest. It was held that in default of payment of the notes the plaintiff could replevy the goods: *Weeks v. Lator*, 8 C. P. 239.

On sale of property it often becomes material to determine in an action of replevin, whether the delivery was absolute with intent to pass the property or conditional on the defendant's doing something stipulated to be done: *Smith v. Hobson*, 16 U. C. R. 368.

Where goods are sold so that the property in the goods is vested in the purchaser, and the vendor refuses to deliver, replevin by the purchaser will lie: *O'Rourke v. Lee*, 18 U. C. R. 609.

A Division Court Bailiff cannot, when a claim is made by a third person to goods and chattels, sell the goods seized under execution and issue an interpleader for the proceeds, and replevin may be maintained against the purchaser of the goods at such sale by the claimant: *Reid v. McDonald* 26 C. P. 147, but if claim is made to the proceeds of goods sold he may interplead therefor. *Ib.* p. 163.

Where neither possession nor property in a chattel has passed, a purchaser cannot maintain replevin: *Henry v. Cook*, 8 C. P. 29, nor if there is not a contract within the Statute of Frauds: *Kaitling v. Parkin*, 23 C. P. 569.



Where a chattel is hired and possession given on the terms of certain monthly payments being made, and on such being made the chattel is to become the property of the person to whom it is hired, the hirer can, in default of payment of the instalments, maintain replevin for the chattel: *Mason v. Johnson*, 27 C. P. 208. See, also, *Nordheimer v. Robinson*, 2 App. R. 305; *Walker v. Hyman*, 1 App. R. 345; *McDonald v. Forrestal*, 29 Grant 300, but a demand should first be made therefor: *Tuffts v. Mottashed*, 29 C. P. 539.

In *Arnold v. Higgins*, 11 U. C. R. 191, it was held that goods seized under an attachment from the Division Court might be replevied in a Superior Court by a third party claiming them as his own, and so he would appear to have the right to do yet, as the attachment is not against him: Rev. Stat. (Ont.) Chapter 53, section 3. See *Jameson v. Kerr*, 6 P. R. 3; *Anderson v. McEwan*, 8 C. P. 532; *Barclay v. Sutton*, 7 P. R. 14.

Where the goods of A. having been seized by the Sheriff under an execution against D. had been handed over by the Sheriff to an assignee to whom B. had made a voluntary assignment in insolvency, it was held that A. might maintain replevin against the assignee: *Burke v. McWhirter*, 35 U. C. R. 1.

During the Insolvent Act it was held that goods could be replevied out of the hands of the guardian in insolvency: *Jameson v. Kerr*, 6 P. R. 3, but that goods in the hands of an official assignee could not be: *Barclay v. Sutton*, 7 P. R. 14. See, also, *Campbell v. Lapan*, 21 C. P. 363.

A person agreed to manage a farm in considera-

tion of his getting among other things, one-third of the increase of the young stock. On the death of the owner the farm manager sold all the stock, and it was held that he had no right to do so, and replevin might be maintained by the administratrix of the owner against the purchaser: *Duffill v. Erwin*, 18 U. C. R. 431.

The taking of property under one writ of replevin does not prevent the operation of a second writ upon the same property: *Crawford v. Thomas*, (Sheriff), 7 C. P. 63; provided the plaintiff is not the party against whom the first writ issued: Replevin Act, section 3 and 48 Victoria, Chap. 13, section 8 (Ontario.)

Although there may be moneys due on settlement of accounts between workman and employer, the latter can maintain replevin against the former for the goods on which the work is done: *Bush v. Pimlott*, 9 C. P. 54.

Goods cannot be replevied from the possession of any one but the defendant, but an amendment could be made substituting the possessor of the goods as defendant: *Hoorigan v. Driscoll*, 8 P. R. 184.

As to replevin against a mortgagee distraining for arrears of interest: see *R. C. Bank v. Kelly*, 19 C. P. 196, 20 C. P. 519, 22 C. P. 279; *T. & L. Co. v. Lawrason*, 45 U. C. R. 176; *Ex parte Punnett*, *In re Kitchin*, 16 Ch. D. 226; *In re Threlfall*, 16 Ch. D. 274; 14 L. J. N. S. 8; Ont. Digest 211.

A plaintiff in replevin can recover for such portion of the property replevied as he can prove title to. The action is divisible: *Henderson v.*

*Sills*, 8 C. P. 68; *Sills v. Hunt*, 16 U. C. R. 521; *Miller v. Miller*, 17 C. P. 226; *Haggart v. Kernahan*, 17 U. C. R. 341; *Canniiff v. Bogart*, 6 U. C. L. J. 59.

A person who purchases goods under a fraudulent representation by him may give title to his vendee so as to defeat an action of replevin by his vendor against such vendee if the original seller has not disaffirmed the contract before the issue of the writ of replevin: *Clough v. L. & N. W. Ry Co.*, L. R. 7 Ex. 26; *Stoeser v. Springer*, 7 App. R. 497; *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214.

Growing timber sold and cut into logs can be replevied by the purchaser as against the owner of the land: *McGregor v. McNeil*, 32 C. P. 538.

A Sheriff or Bailiff who has seized goods under execution and has not abandoned the seizure, is entitled to maintain replevin therefor: *Patterson v. McKellar*, 4 Ont. R. 407.

In an action of replevin a boarding-house keeper can set up a lien under R. S. O., Chapter 147: *Rees v. McKeown*, 7 App. R. 521.

As to who is a boarding-house keeper within the meaning of that Statute: see *R. v. Buckle*, 4 East 346; *Clarke v. Powell*, 4 B. & Adol. 846; *R. v. Andrews*, 25 U. C. R. 196; *Scott v. North*, L. R. 2 C. P. 270; *Rees v. McKeown*, 7 App. R. 521.

As to the action of Replevin generally in Division Courts, see Sinclair's D. C. Act, 69-76, 241, 248-250, 286, 287, 291, 306, 311, 331, 332.

#### PROCEEDINGS IN REPLEVIN.

The affidavit, when not made by the plaintiff himself, should describe the deponent as servant or agent of the plaintiff, and would not be good if

described as "now acting for the said plaintiff": *Arnold v. Hamilton*, 1 P. R. 263.

The affidavit should be sufficient to enable the Sheriff or Bailiff to identify the property, and if insufficient for that purpose the writ can be set aside: *Jones v. Cook*, 2 P. R. 396.

Sheriffs and Bailiffs should observe the necessity for their making a proper return to the writ: *Carveth v. Greenwood*, 3 P. R. 175.

Where, in the High Court the Sheriff is defendant the writ may be directed to the Coroners: *Gilchrist v. Conger*, 11 U. C. R. 197.

In the Division Court the writ must issue from the Division Court for the Division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been taken or detained: *Sinclair's D. C. Act*, 70; but in the High Court or the County Court the action is transitory if the goods have not been replevied for distress: *B. & L. H. Ry. Co. v. Gordon*, 3 U. C. L. J. 28; *Vance v. Wray*, 3 U. C. L. J. 69; *Perrin v. Conley*, 14 U. C. R. 53; *Barber v. Armstrong*, 5 P. R. 153.

An objection that there was no taking is no ground for setting aside the writ, but the subject of defence only: *Gilchrist v. Conger*, 11 U. C. R. 197.

Replevin should not in Division Courts be joined with any other form of action: *G. W. Ry. Co. v. Chadwick*, 3 U. C. L. J. 29.

In an action against a Bailiff a denial of the taking would generally raise all his defence:

*Calcutt v. Ruttan*, 13 U. C. R. 146; *Clark v. Ruttan*, 6 C. P. 97.

Where an action is brought for the detention of the goods only, the claim should be framed as in detinue: *Stephens v. Cousins*, 16 U. C. R. 329; but a lien cannot be given in evidence under a plea denying the plaintiff's property: *Ib.*

A writ of replevin cannot be legally executed by a Bailiff by taking goods out of the peaceable possession of one man when his writ is against another: *G. W. Ry. Co. v. McEwan*, 28 U. C. R. 528, 30 U. C. R. 559; *Stoeser v. Springer*, 7 App. R. 497.

In a writ of replevin it was held insufficient to describe the property as "two hundred and thirty sheep and lambs" unjustly detained by the defendant, and that such property could not be seized under such writ while they were in possession of a party not named therein: *Hoorigan v. Driscoll*, 8 P. R. 184.

A writ of replevin in the Division Court may be served in the same way as an ordinary summons in that Court: Replevin Act, section 5.

Notice of action is not necessary in replevin: *Folger v. Minton*, 10 U. C. R. 423; *Kennedy v. Hall*, 7 C. P. 218; *Applegarth v. Graham*, 7 C. P. 171; *Lewis v. Teale*, 32 U. C. R. 108; *Ibbotson v. Henry*, 21 L. J. N. S. 273.

It is doubtful if a replevin suit can be removed by *certiorari*: *Meyers v. Baker*, 26 U. C. R. 16; but see *Heaton v. Cornwall*, 4 P. R. 148.

A Bailiff would be liable for not executing the writ: *Boys v. Smith*, 9 C. P. 27, 6 U. C. L. J. 182.

In some respects the action of replevin is within the Judicature Act: *Campan v. Lucas*, 9 P. R. 142; *Wallace v. Cowan*, 9 P. R. 144; *Bradley v. Clarke*, 9 P. R. 410.

Where one party intermingles his property with that of another all the latter can require in replevin is that he should be permitted to take from the whole an equivalent number and quality for those which he originally possessed: *McDonald v. Lane*, 7 Sup. R. 462; Drake on Attachment, 5th Ed., section 199.

Payment into Court may be pleaded to an action on the bond: *Thompson v. Kaye*, 13 C. P. 251; so also may set-off: *McKelvey v. McLean*, 34 U. C. R. 635.

A certificate for costs is necessary in the High Court and County Court: *Ashton v. McMillan*, 3 P. R. 10; *In re Coleman v. Kerr*, 28 U. C. R. 297, but it is not so in the Division Court.

It has been decided that replevin is not maintainable against a pound-keeper: *Ibbotson v. Henry*, 21 L. J. N. S. 273.

REPLEVIN BOND.

A replevin bond entered into by the principal and three sureties is sufficiently in accordance with the Replevin Act, and the assignee may sue on it in his own name under that Act: *Meyers v. Maybee*, 10 U. C. R. 200; *Bacon v. Langton*, 9 C. P. 410; *Becker v. Ball*, 18 U. C. R. 192; or under the Revised Statutes of Ontario, chapter 116, section 7: *Bates v. Mackey*, 1 Ont. R. 34.

A subscribing witness is necessary to its validity but one will do: *Heley v. Cousins*, 34 U. C. R. 63.

An action would be maintainable against the Bailiff for refusing to assign the bond to the person entitled: *Pacaud v. McEwan*, 31 U. C. R. 328.

The Court has always power, which it will exercise, to stay proceedings on a replevin bond, whenever it would be equitable and just to do so. *Bates v. Mackey*, 1 Ont. R. 34; see also, *Ruttan v. Short*, 12 U. C. R. 485; *Hedley v. Closter*, 13 U. C. R. 333; *Culham v. Love*, 30 U. C. R. 410.

If the plaintiff does not prosecute his suit with effect and without delay, the defendant may take an assignment of the bond from the Bailiff, and sue on it in his own name: *Becker v. Ball*, 18 U. C. R. 192; *Welsh v. O'Brien*, 28 U. C. R. 405; *Mulvaney v. Hopkins*, 18 U. C. R. 174; *Johnson v. Parke*, 12 C. P. 179; *Meloche v. Reaume*, 34 U. C. R. 606; *Culham v. Love*, 30 U. C. R. 410; *Caswell v. Catton*, 9 U. C. R. 282, 462; *Bletcher v. Burn*, 24 U. C. R. 124, 259; *Meyers v. Baker*, 26 U. C. R. 16; *Golding v. Bellnap*, 26 U. C. R. 163; *Patterson v. Fuller*, 31 U. C. R. 323; *McKelvey v. McLean*, 34 U. C. R. 635.

If a Bailiff should seize without first taking the necessary bond, the seizure could be set aside: *Lawless v. Radford*, 9 P. R. 33.

A matter of defence to the action of replevin cannot be set up in an action on the bond: *Meyers v. Maybee*, 10 U. C. R. 200.

The sureties to a replevin bond may be unintentionally discharged, as by a release or discharge of one of the obligers, postponement of the trial, or reference to arbitration, without their consent, or any new arrangement without the concurrence of

the sureties by which their rights might be prejudiced: *Kirkendall v. Thomas*, 7 U. C. R. 30; *Hatt v. Gilleland*, 1 U. C. R. 540; *Canniff v. Bogert*, 6 C. P. 474; *Burke v. Glover*, 21 U. C. R. 294; *Polak v. Everett*, 1 Q. B. D. 669; *Holme v. Brunskill*, 3 Q. B. D. 495; *Ward v. National Bank of New Zealand*, 8 App. Cas. 755; *Sinclair's D. C. Act*, 75.

The bond can be sued in the Division Court, no matter what the penalty may be: *Sinclair's D. C. Act*, 213.

#### REPLEVIN GENERALLY.

It is not necessary that the plaintiff should ever have had possession of the property to maintain the action of replevin: *Woods v. Nixon*, Addison 134; *Harlan v. Harlan*, 3 Harris 507; *Sayward v. Warren*, 27 Maine 453; *Beebe v. DuBau*, 3 English 510; *Osgood v. Green*, 10 Foster (N. H.) 210; *Chinn v. Russell*, 2 Blackf. 172, and whether the property in the goods be absolute or qualified: *Whetwell v. Wells*, 24 Pick. 25; *Johnson v. Hunt*, 11 Wendell, 137; *Rogers v. Arnold*, 12 Wendell, 30; *Hunt v. Chambers*, 6 Penn. L. J. 82; *Smith v. Williamson*, 1 Har. & J. 147; *Mildrum v. Snow*, 9 Pick. 441.

But the plaintiff must have the *right* of possession; *Haythorn v. Rushford*, 4 Harr. R. 160; *Harris v. Smith*, 3 S. & R. 20; *Pierce v. Stephens*, 30 Maine, 184; *Partridge v. Swaby*, 46 Maine, 184; *Hunt v. Strew*, 33 Mich. 85; *Spencer v. Roberts*, 42 Conn. 75; *Morris on Replevin*, 77.

Articles carried about the person of the defendant or worn by him cannot while so worn or carried be taken from him under the writ of replevin:



*Moxham v. Day*, 16 Gray, 203, 220; *Sunbolz v. Alford*, 3 M. & W. pp. 253, 254.

Goods obtained by fraud or by purchase on a preconceived design not to pay for them can be replevied by the vendor: *Earl of Bristol v. Wilsmore*, 1 B. & C. 514; *Peer v. Humphrey*, 2 A. & E. 495; *Stevenson v. Newnham*, 13 C. B. 285; *Pease v. Gloaher*, L. R. 1 P. C. 219; *Kingsford v. Merry*, 11 Ex. 577; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Clough L. & N. W. Ry. Co.*, L. R. 7 Ex. 26; *Morrison v. The Universal M. Ins. Co.*, L. R. 8 Ex. 40; but an innocent purchaser from the fraudulent vendee would be protected: *White v. Garden*, 10 C. B. 919; *Stoeser v. Springer*, 7 App. R. 497; Morris on Replevin, 97; but not if there was no sale: *Higgins v. Barton*, 26 L. J. Ex. 342; *Hardman v. Booth*, 1 H. & C. 803; *Lindsay v. Cundy*, 2 Q. B. D. 96; 3 App. Cas. 459.

The true owner of goods which have been stolen, or found or bought from some one who had no authority to sell, may recover them by replevin, no matter where found, and it is of no consequence that they have been sold at public sale: *Mackinley v. McGregor*, 3 Whar. 396; *Buffington v. Gerrish*, 15 Mass. 156; *Mowrey v. Walsh*, 8 Cowen, 238; *Thompson v. Rose*, 16 Conn. 71; *Porter v. Foster*, 20 Maine, 391; *Rowley v. Bigelow*, 12 Pick. 307; or transferred to an assignee for the benefit of creditors: *Farley v. Lincoln*, 51 N. H. 577.

The purchaser of goods from one who has no title can acquire no better title than his vendor, and the true owner can recover in replevin: *Kirby v. Cahill*, 6 O. S. 510; *Lecky v. McDermott*, 8 S. & R.

500; *Rapp v. Palmer*, 3 W. 178; *Cundy v. Lindsay*, 2 Q. B. D. 96; 3 App. Cas. 459.

If a man borrow a chattel and afterwards sell it, the owner can recover in replevin against the purchaser or any one else: *Roland v. Gundy*, 5 Ohio, 202; *Conner v. Comstock*, 17 Ind. 90.

In the United States there is no market overt, and a purchaser cannot, as in England, acquire title by purchase in public market as against the true owner: *Morris on Replevin*, 91, 92, and such is the law in this Province.

If the real owner of goods suffer another to have possession of his property and of those documents which are the indicia of ownership, or under circumstances which imply a right to sell them, a sale by such person would bind the true owner and defeat an action of replevin: *Dyer v. Pearson*, 3 B. & C. 38; *Irving v. Motly*, 7 Bing. 543; *Barnes v. Bartlett*, 15 Pick. 71; *Boyson v. Coles*, 6 M. & S. 23; *Rapp v. Palmer*, 3 W. 178; *Morris on Replevin*, 95 L. R. Digest (1880), 3336-3360.

If a person buys goods for cash and gets possession of them, and then refuses to pay cash for them, the vendor can repossess himself by replevin: *Harris v. Smith*, 3 S. & R. 20; *Henderson v. Lauck*, 9 Harris, 359.

Money in a box, or leather made into shoes, if sufficiently identified, is no doubt recoverable: *Morris on Replevin*, 100. When the property has been changed a new right of action arises to reclaim it by replevin in the shape it has assumed, but it should be described in the writ as it existed at the commencement of the suit: *Brown v. Sax*, 7

Cowen, 95 ; *Betts v. Lee*, 5 Johns. 348 ; *Wingate v. Smith*, 20 Maine, 287, *Snyder v. Vaux*, 2 R. 427.

Where there was an agreement for the sale of corn, to be paid for on delivery of the last load, and the corn as hauled to the buyer's mill was, in the presence of one of the sellers, emptied into a heap with other corn, and after delivering the last load the buyer failed to pay, it was held that the mixture of the corn did not prevent the reclamation of so much of it as the vendor delivered, and that replevin lay for it: *Henderson v. Lauck*, 9 Harris, 359 ; *Low v. Freeman*, 12 Ill. 467 ; *Low v. Martin*, 18 Ill. 286 ; *Warner v. Cushman*, 31 Ill. 283 ; *Schulenburg v. Harriman*, 2 Dillon, 398 ; *McDonald v. Lane*, 7 Sup. R. 462.

Replevin will lie for a swarm of bees: *Morris on Replevin*, 101 ; Rev. Stat. Ont. Chapter 96, and for the increase of animals, though the increase were after the taking: *Morris*, 101 ; but not for animals *feræ naturæ* and unreclaimed: *Ib.*

Replevin will lie for a ship and her sails: *Marsl.* 110 ; *Prideaux v. Warne*, Sir T. Raym. 132, but not after a decree of condemnation as a prize by a Court of Admiralty: *Morris on Replevin*, 102.

Replevin can be maintained for a vessel acquired under proceedings *in rem* in a foreign Admiralty Court: *Morris on Replevin*, 102 ; *VanEvery v. Ross*, 21 U. C. R. 542 ; *Castrique v. Imrie*, L. R. 4, H. L. 414.

As a general proposition, title to land cannot be tried in an action of replevin: *Eaton v. Southby*, Willea, 131 ; *Snyder v. Vaux*, 2 R. 427 ; *Vausse v. Russel*, 2 McCord, 329 ; nor can a house built on

leased land be taken in replevin, nor will the writ justify the severance and delivery of fixtures ; *Roberts v. Dauphin Bank*, 7 Harris, 71 ; *Cresson v. Stout*, 17 Johns. 116 ; *Oates v. Cameron*, 7 U. C. R. 228 ; *Lee v. Gaskell*, 1 Q. B. D. 700 ; *Keefer v. Merrill*, 6 App. R. 121 ; *Ex parte Gould*, *In re Walker*, 13 Q. B. D. 454 ; *In re Moser*, 13 Q. B. D. 738 ; *Wake v. Hall*, 7 Q. B. D. 295, S. C. 8 App. Cas. 195 ; *Dickson v. Hunter*, 29 Grant 73 ; *McCausland v. McCallum*, 3 Ont. R. 365 ; R. & J's. Digest, 3832.

But if a building is wrongfully removed the owner of the land may recover its possession by means of replevin : *Huebschmann v. McHenry*, 29 Wis. 655 ; *Ogden v. Stock*, 34 Ill. 522.

A person out of possession of land cannot try his title to it against one in the actual possession, with claim of title by bringing replevin or trover against him for timber cut or slates quarried upon the premises : *Brown v. Caldwell*, 10 S. & R. 114 ; *Powell v. Smith*, 2 Watts, 126 ; *Mather v. Trinity Church*, 3 S. & R. 509 ; *Baker v. Howel*, 6 S. & R. 476 ; *DeMott v. Hagerman*, 8 Cowen, 220. This would not be so if the timber-cutter or quarrier were a trespasser merely, but one in possession of land with claim of title, or having the constructive possession which the law casts upon the owner of the legal title of wild or unoccupied land, may maintain replevin for timber severed from it, and carried away by a trespasser, and this though the timber has been worked into posts or rails, shingles or the like since the severance : *Snyder v. Vaux*, 2 R. 427 ; *Clement v. Wright*, 4 Wright, 250 ; *Heaton*  
FF

v. *Findley*, 2 Jones 304; *Brewer v. Fleming*, 1 P. F. Smith, 102; *Corbett v. Lewis*, 3 *Ib.* 322; *Young v. Herdic*, 5 *Ib.* 172; *Hungerford v. Redford*, 29 Wis. 345; *Davis v. Easley*, 13 Ill. 192; *Anderson v. Hapler*, 34 Ill. 436.

The title to land may incidentally arise in replevin: *Lehman v. Killerman*, 15 P. F. Smith, p. 492; and if it should in the Division Court, it would not, it is submitted, oust the jurisdiction; *Munsie v. McKinley*, 15 C. P. 50.

A Sheriff or Bailiff should not deliver more articles than are named in the writ. Thus, a writ requiring a Sheriff to replevy 400 tons of ore, was held not to justify him in delivering 720 tons: *Dewitt v. Morris*, 13 Wend. 496; *Gardner v. Lane*, 9 Allen, 492.

It is a good return to say that the cattle are dead or the goods destroyed by fire: *Morris on Replevin*, 115.

The Statute of Limitations applies to the action of replevin, therefore the writ must be issued within six years from the unjust taking or detention: *Morris on Replevin*, 121.

Several persons cannot join in one replevin for several goods where the property is several: *Hart v. Fitzgerald*, 2 Mass. 509.

All part owners of a chattel must join in a replevin suit, nor can a tenant in common, or joint tenant or partner maintain replevin against his co-tenant or co-partner for taking the common property: *McNabb v. Howland*, 11 C. P. 434; *Morris on Replevin*, 125; *Ecclestone v. Jarvis*, 1 U. C. R. 370. Replevin should not be brought in

the name of a mere servant whose possession is that of his master: *Ib.* 125, or of one who never had any lawful possession; *Cool v. Mulligan*, 13 U. C. R. 613.

In general, any one in possession of the goods or having control of them may be made defendant: *Hall v. White*, 106 Mass. 599; *Richardson v. Reed*, 4 Gray, 441.

If goods are taken by A. at the command of B. the replevin may be against both of either: *Gilbert on Replevin*, 162; *Kirby v. Cahill*, 6 O. S. 510.

Replevin lies after sale against the vendee of the Sheriff or other officer: *Shearick v. Huber*, 6 Binn. 2; *Lamb v. Johnson*, 10 Cushing, 126.

As to the rights and liabilities of parties to the replevin bond: See *Morris on Replevin*, 266-296.

Possession obtained improperly will not give a right of action in replevin: *McCrary v. McCrary*, 22 U. C. R. 520. But generally, possession is good as against a mere wrong-doer: *McDougall v. Smith*, 30 U. C. R. 607.

Under our Statute replevin can be maintained for leases or other title deeds. *Burr v. Munro*, 6 O. S. 57; *Anderson v. Hamilton*, 4 U. C. R. 372; *Dowling v. Miller*, 9 U. C. R. 227.

Replevin can be brought for goods distrained off the premises: *Huskinson v. Lawrence*, 26 U. C. R. 570.

Where the action is founded on trover a demand before action is necessary in replevin, if it would have been necessary in an action of trover: *R. & J's Digest*, 3836, 3837.

As to when trespass and trover are maintainable and as a consequence replevin : see R. & J's Digest, 3761-3771, 3826-3847 ; Ontario Digest, 209-213, 767.

### REPLEVIN BOND.

[*To be used in all cases except in cases of distress for rent or damage-feasant.*]

Know all men by these presents, that we A. B., of &c., W. B., of &c., and J. S., of &c., are jointly and severally held and bound to V. W., Bailiff of the Division Court in the County of        in the sum of \$       , to be paid to the said Bailiff, or his certain attorney, executors, administrators or assigns, for which payment, to be well and truly made, we bind ourselves and each and every of us in the whole, our and each, and every of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this        day of        A. D., 18       .

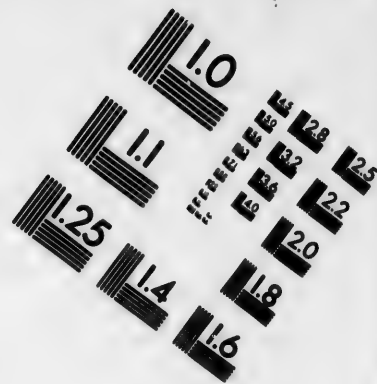
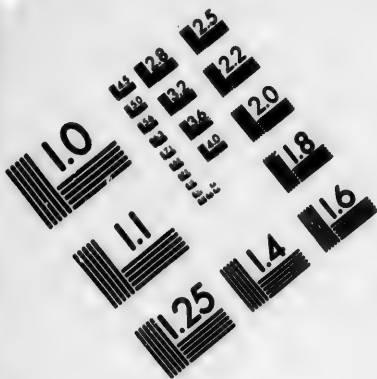
The condition of this obligation is such, that if the above bounden A. B. do prosecute his suit with effect and without delay against C. D., for the taking and unjustly detaining (*or, unjustly detaining, as the case may be*) of his cattle, goods and chattels, to wit : (*here set forth the property distrained, taken or detained*), and do make a return of the said property, if a return thereof shall be adjudged, and also do pay such damages as the said C. D. shall sustain by the issuing of the writ of replevin if the said A. B. fails to recover judgment in the suit [and also to indemnify and save harmless the said C. D. from all loss and damage

which he may sustain by reason of the seizure, and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges and expenses which the said C. D. may incur, including reasonable costs not taxable between party and party] ; and further do, observe, keep and perform all orders made by the Court in the suit ; then this obligation shall be void or else remain in full force and effect.

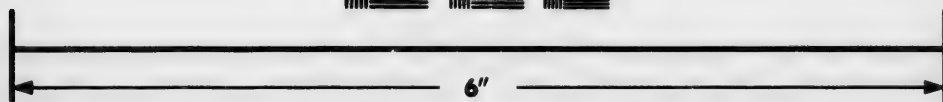
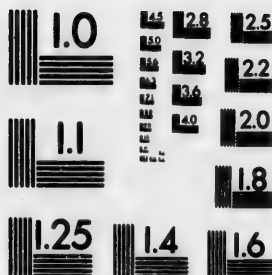
Signed, Sealed and delivered	}	A. B. [L.S.]
in the presence of		W. B. [L.S.]
		J. S. [L.S.]

*(That part of the above Form within brackets is rendered unnecessary by the Statute 48 Victoria, Chapter 13, section 8, and is to be used in all cases except in actions for distress for rent or damage-feasant, in either of which cases that part must be omitted. The Form to be followed in the latter cases will be found at pages 331 and 332 of Sinclair's D. C. Act, at which and the following page will also be found other Forms in replevin. The Bond must be in treble the value of the property to be replevied as stated in the writ. Replevin Act, sect. 11. Rule 46 ; if not the seizure could be set aside : Lawless v. Radford, 9 P. R. 33.)*





# **IMAGE EVALUATION TEST TARGET (MT-3)**



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# AN ACT TO AMEND THE LAW AS TO GARNISHING DEBTS.

48 Victoria, Chapter 15 (Ontario).

[Assented to 30th March, 1885.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

48 V. c. 10,  
s. 21, amended.

1. Section 21 of *The Creditors' Relief Act, 1880*, is hereby amended by adding the following as sub-sections 5 and 6:

(5) The provisions of sub-sections 3 and 4 of this section shall also apply, as nearly as may be, to any person who attaches a debt in the Division Court before judgment, and to the money so attached.

(6) In case a garnishee, under an order of the Court, pays to the garnishor, or in case a garnishee, without notice that the Sheriff is entitled, pays the amount of his indebtedness into Court and the same is paid out to the garnishor, the Sheriff may recover from the garnishor the amount received by him.

R. S. O.,  
c. 68, s. 16,  
amended.

2. Section 16 of *The Revised Statute Respecting Absconding Debtors*, is hereby amended by inserting after "warrants of attachment issued," in the seventh line, the words "or money paid into Court under a garnishee summons."

*The 21st section of the Creditors' Relief Act of 1880 will now read as follows:*

Attaching  
orders by  
sheriff or  
creditors.

"Where there are in the Sheriff's hands several executions and claims, and there are not, or do not appear to be, sufficient lands or goods, as the case may be, to pay all, with his own fees, he may apply for an order attaching any debt owing to the execution debtor by any persons resident in the County of such Sheriff, whether such debt is owing by such person alone or jointly with any other person resident or non-resident in such County, and to procure such attachment the Sheriff may take the same proceedings as a creditor; and in such case any writ of execution or other writ in the course of the proceedings, may be directed to him in the same manner as if the attachment were by a creditor; and what comes to the Sheriff's hands in respect of the debts attached, he shall distribute in the same manner as if he had realized the same from property seisable by him under execution.

"(2) In case the Sheriff does not take such proceedings, any person entitled to distribution may take the same for the common benefit of himself and all other persons entitled to distribution as aforesaid, and the person owing the attached debt shall pay the same to the Sheriff."

"(3) Any judgment creditor who attaches a debt shall be deemed to do so for the common benefit of himself and all creditors entitled under this Act; payment of such debt shall be made to the Sheriff, who in making distribution will apportion to such judgment creditor a share *pro rata*, according to the amount owing upon his judgment, of the whole amount to be distributed under the provisions of this Act, but such share shall not exceed the amount recovered by such garnishee proceedings unless the judgment creditor has placed a writ in the Sheriff's hands.

"(4) Money garnished and paid into the Sheriff's hands shall be deemed to be money levied under execution, within the meaning of this Act, except that, unless the garnishee proceedings were taken by him, the Sheriff shall only be entitled to charge poundage on such moneys at the rate of one and a quarter per cent."

[The first section of this Act makes the provisions of section 21 of The Creditors' Relief Act apply to garnishment proceedings in the Division Court and places primary creditors in garnishment proceedings in such Court on the same level as attaching creditors in other Courts. If money is paid to the garnishor directly, or paid into Court and paid out to him by the Clerk, the Sheriff may, if the case is within the Creditors' Relief Act, sue for and recover the amount so paid to or received by such garnishor.

The 2nd section of this Act gives the Sheriff the same right to any money paid into the hands of a Division Court Clerk under garnishment process as he would have under the 16th section of the Act respecting Absconding Debtors, (R. S. O. page 829.)]

# AN ACT RESPECTING ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

48 Victoria, Chapter 26 (Ontario.)

[Assented to 30th March, 1885.]

**Preamble.** Whereas great difficulty is experienced in determining cases arising under the present law relating to the transfer of property by persons in insolvent circumstances, or on the eve of insolvency, and it is desirable to remedy the same;

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

R. S. O. c.  
118, s. 2,  
and 47 V.  
c. 10, s. 3,  
repealed.

1. Section 2 of the *Act respecting the Fraudulent Preference of Creditors by persons in insolvent circumstances*, chapter 118 of the Revised Statutes, and section 3 of the *Administration of Justice Act, 1884*, are hereby repealed, and the following sections are substituted therefor.

Gift, transfers, etc., made by insolvents, which defeat or prejudice creditors, to be void.

2. Every gift, conveyance, assignment or transfer, delivery over or payment of any goods, chattels or effects, or of any bills, bonds, notes, securities, or of any shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by any person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall, as against them, be utterly void.

Assignments for benefit of creditors and bona fide sales, etc., protected.

3. (1) Nothing in the preceding section shall apply to any assignment made to the Sheriff of the county in which the debtor resides or carries on business, or to another assignee with the consent of the creditors as hereinafter provided, for the purpose of paying ratably and proportionately and without preference or priority all the creditors of the debtor their just debts; nor to any *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties; nor to any payment of money to a creditor unless an assignment for the general benefit of creditors is made within one month after the payment, nor to any *bona fide* gift, conveyance, assignment, transfer or delivery over of any goods, securities or property of any kind, as above mentioned, which is made in consideration of any present actual *bona fide* payment in money, or by way of security

for any present actual *bona fide* advance of money, or which is made in consideration of any present actual *bona fide* sale or delivery of goods or other property; Provided that the money paid, or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

(2) Nothing herein contained is to affect any Act respecting wages passed during the present session, or to prevent a debtor providing for payment of wages due by him in accordance with the provisions of any such Act.

(3) In case a payment of money is made to a creditor under the circumstances mentioned in the second section, and within one month before the execution of an assignment for the general benefit of creditors under this Act, the same shall be void as against the assignment, but not as against persons claiming in any other way.

(4) The debtor may in the first place with the consent of a majority of his creditors having claims of \$100 and upwards computed according to the provisions of section 18, make a general assignment for the benefit of his creditors, to some person other than the Sheriff.

4. Every assignment made under this Act, for the general benefit of creditors shall be valid and sufficient if it is in the words following, that is to say, all my personal property which may be seized and sold under execution and all my real estate, credits and effects, or if it is in words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure, or sale under execution, subject, however, as regards lands, to the provisions of the registry law as to the registration of the assignment.

Form of assignment for general benefit of creditors.

5. If any assignor or assignors executing an assignment under this Act for the general benefit of his or their creditors owes or owe, debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full.

How claims to rank

6. A majority in number and value of the creditors who have proved claims to the amount of \$100 or upwards, may at their discretion substitute for the sheriff a person residing in the county in which the debtor resided, or carried on business at the time of the assignment. An assignee may also be removed, and another assignee may be substituted, or an additional assignee may be appointed by a Judge of the High Court, or of the County Court where the assignment is registered.

Appointment of assignee

**Rights of Assignee.**

7. (1) Save as provided in the next sub-section the assignee shall have an exclusive right of suing for the rescission of agreements, deeds and instruments or other transactions made or entered into in fraud of creditors, or made or entered into in violation of the *Act respecting the fraudulent preference of creditors by persons in insolvent circumstances*, or of this Act.

(2) If at any time any creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the trustee under the authority of the creditors or inspectors, refuses or neglects to take such proceeding, after being duly required so to do, such creditor shall have the right to obtain an order of the Judge authorizing him to take such proceedings in the name of the trustee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee, as the Judge may prescribe, and thereupon any benefit derived from such proceedings shall belong exclusively to the creditor instituting the same for his benefit, but if, before such order is granted, the assignee shall signify to the Judge, his readiness to institute such proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from such proceeding, if instituted within such time, shall appertain to the estate.

**Recovery of proceeds where property sold.**

8. If the person to whom any such gift, conveyance, assignment, transfer, delivery or payment as in section 2 of this Act is mentioned has been made shall have sold or disposed of the property which was the subject of such gift, conveyance, assignment, transfer, delivery or payment, or any part thereof, the moneys or other proceeds realized therefor, may be seized or recovered in any actions under the last preceding sections as fully and effectually as the property if still remaining in the possession or control of such persons could have been seized or recovered.

**Assignments to take precedence of judgments and executions.**

9. An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment.

**Amendment of assignment by court.**

10. No advantage shall be taken or gained by any creditor of any mistake, defect or imperfection in any assignment under this Act for the general benefit of creditors if the same can be amended or corrected, and if there be any mistake, defect or imperfection therein the same shall be amended by any Judge of the High Court of Justice, or of the County Court aforesaid, on application of any creditor of the assignor, or of the assignee, on such notice being given to other parties concerned as the judge shall think reasonable, and such amendment, when made, shall have relation back to the date of the said assignment.

11. The assignee shall receive such remuneration as shall be voted to him by the creditors at any meeting called for the purpose after the first dividend sheet has been prepared, or by the Inspectors, in case of the creditors failing to provide therefor, subject to the review of the County Court of the county in which the assignment is registered or the Judge thereof, if complained of by the assignee or any of the creditors.

12. (1) No assignment made for the general benefit of creditors under this Act shall be within the operation of the Revised Statutes of Ontario, chapter 119, intituled *An Act respecting Mortgages and Sales of Personal Property*; but a notice of the assignment shall, as soon as conveniently may be, be published in the *Ontario Gazette* and in one newspaper at the least, having a general circulation in the county in which the property assigned is situate; and the publication in each shall be continued therein for at least four times.

(2) A counterpart or copy of every such assignment shall also within five days from the execution thereof be registered, (together with an affidavit of a witness thereto of the due execution of such assignment or of the due execution of the assignment of which the copy filed purports to be a copy), in the office of the clerk of the county court of the county or union of counties where the assignor, if a resident in Ontario, resides at the time of the execution thereof, or if he is not a resident then in the office of the clerk of the county court of the county or union of counties where the personal property so assigned is or where the principal part thereof (in case the same includes property in more counties than one) is at the time of the execution of the assignment; and such clerks shall file all such instruments presented to them respectively for that purpose, and shall endorse thereon the time of receiving the same in their respective offices, and the same shall be kept there for the inspection of all persons interested therein. The said clerks respectively shall number and enter such assignments, and be entitled to the same fees for services in the same manner as if such assignments had been registered under the *Act respecting Mortgages and Sales of Personal Property*.

13. (1) If the said notice is not published in the regular number of the *Ontario Gazette*, and of such newspaper as aforesaid, which shall respectively be issued first after five days from the execution of the assignment by the assignor, or if the assignment is not registered as aforesaid within five days from the execution thereof, the assignor shall be liable to a penalty of twenty-five dollars for each and every day which shall pass after the issue of the number of the newspaper in which the notice should have appeared until the same shall have been published; and a like penalty



for each and every day which shall pass after the expiration of five days from the execution of the assignment by the assignor until the same shall have been registered.

(2) The assignee is to be subject to a like penalty for each and every day which shall pass after the expiration of five days from the delivery of the assignment to him, or of five days after his assent thereto, the burden of proving the time of such delivery or assent being upon the assignee.

(3) Such penalties may be recovered summarily before a Judge of the High Court or the County Court of the county in which the assignment ought to be published or registered; one-half of the penalty shall go to the party suing, and the other half for the benefit of the estate of the assignor.

Compel-  
ling publi-  
cation and  
registra-  
tion.

14. In case the assignment be not registered, and notice thereof published, an application may be made by any one interested in the assignment to a Judge of the High Court, or of the County Court aforesaid, to compel the publication and registration thereof; and the Judge shall make his order on that behalf, and with or without costs, or upon the payment of costs by such person as he may in his discretion direct to pay the same.

Assign-  
ment not  
invalida-  
ted by  
omission to  
publish  
etc.

15. The omission to publish or register as aforesaid, or any irregularity in the publication or registration, shall not invalidate the assignment.

Assignee to  
call meet-  
ing of cred-  
itors.

16. It shall be the duty of the assignee to immediately inform himself, by reference to the debtor and his records of account, of the names and residences of the debtor's creditors, and within five days from the date of assignment to convene a meeting of the creditors for the appointment of inspectors and the giving of directions with reference to the disposal of the estate, by mailing prepaid and registered to every creditor known to him, a circular calling a meeting of creditors to be held in his office or other convenient place to be named in the notices not later than twelve days after the mailing of such notice, and by advertisement in the *Ontario Gazette*; and all other meetings to be held shall be called in like manner.

Voting at  
meeting.

17. At any meeting of creditors the creditors may vote in person, or by proxy authorized in writing, but no creditor whose vote is disputed shall be entitled to vote until he has filed with the assignee an affidavit in proof of his claim stating the amount and nature thereof.

Scale of  
votes.

18. (1) Subject to the provisions of section 6, all questions discussed at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:

For every claim of or over \$100, and not exceeding \$200....1 vote.  
 " " \$200, " " \$500... 2 votes.  
 " " \$500, " " \$1000...3 votes.  
 " additional \$1000, or fraction thereof.....1 vote.

(2) No person shall be entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

(3) In case of a tie the assignee, or if there are two assignees, then the assignee appointed by the creditors, or by the Judge, if none has been appointed by the creditors, shall have a casting vote.

(4) Every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof; and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon, and the assignee under the authority of the creditors may either consent to the right of the debtor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the assignee has realized such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate.

(5) If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim.

19. (1) Every person claiming to be entitled to rank on the estate assigned shall furnish to the assignee particulars of his claim proved by affidavit and such vouchers as the nature of the case admits of. Proof of claim.

(2) A person whose claim has not accrued due shall nevertheless be entitled to prove under the assignment and vote at meetings of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for the time which has to run until the claim becomes due.

20. The law of set-off shall apply to all claims made against the estate and also to all suits instituted by the assignee for the recovery of debts due to the assignor, in the same manner and to the same extent as if Set-off.

the assignor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this or any other Act respecting frauds or fraudulent preferences.

Affidavits.

21. Any affidavit authorized, or required, under this Act may be sworn before any person authorized to administer affidavits in the High Court, or before a Justice of the Peace, or, if sworn out of Ontario, before a Notary Public

Com-  
mence-  
ment of  
Act.

22. This Act shall not go into force until a day to be named by the Lieutenant-Governor by his proclamation.

*[A proclamation has been issued by the Lieutenant-Governor bringing this Act into force on the first day of September, 1885.]*

## AN ACT RESPECTING WAGES.

*48 Victoria, Chapter 29 (Ontario.)**[Assented to 30th March, 1885.]*

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. Whenever an assignment is made of any real or personal property for the general benefit of creditors, the assignee shall pay in priority to the claims of the ordinary or general creditors of the person making the same, the wages or salary of all persons in the employment of such person at the time of the making of such assignment, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary or general creditors for the residue, if any, of their claims.

Wages or salaries to have priority in assignments for benefit of creditors.

2. In distributing the assets of a company under the provisions of *The Wages or Joint Stock Companies' Winding up Act*, the liquidator shall pay in priority to the claims of the ordinary or general creditors of the company the wages or salary of all persons in the employment of the company at the time of the making of the winding-up order, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary or general creditors of the company for the residue, if any, of their claims.

salaries to have priority in winding up proceedings under 41 V. c. 5.

3. All persons in the employment of an execution debtor at the time of the entry of the notice mentioned in section five of *The Creditors' Relief Act, 1880*, or within one month before such entry, who shall become entitled to share in the distribution of money levied out of the property of a debtor within the meaning of the said Act, shall be entitled to be paid out of such money the wages or salary due to them by the execution debtor, not exceeding three months' wages or salary, in priority to the claims of the other creditors of the execution debtor, and shall be entitled to share *pro rata* with such other creditors as to the residue, if any, of their claims.

Rights of employees of execution debtors.

4. This Act shall apply to wages or salary whether the employment in respect of which the same shall be payable, be, by the day, by the week, by the job or piece or otherwise.

Wages or salary affected by this Act.

5. This Act is not intended to apply to an assignment made under the provisions of any Act of the Parliament of Canada relating to or respecting Bankruptcy or Insolvency.

Application of Act.

AN ACT TO AMEND THE ACT RESPECTING  
MUTUAL FIRE INSURANCE COMPANIES.

48 Victoria, Chapter 35 (Ontario.)

[Assented to 30th March, 1885.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

R. S. O. c.  
161, s. 71,  
amended.

Suits on  
premium  
notes in  
Division  
Courts,  
where  
brought.

1. Section 71 of *The Act respecting Mutual Fire Insurance Companies*, chapter 161 of the Revised Statutes, is hereby amended by adding thereto the words following: "Provided always, that the provisions of this section shall not apply to nor include any such premium note or undertaking made or entered into after the first day of July, 1885, nor any sum assessed thereon, unless within the body of such note or undertaking or across the face thereof, there was at the time of the making or entering into the same, printed in conspicuous type, and in ink of a colour different from any other in or on such note the words following; 'any action which may be brought or commenced in a Division Court in respect or on account of this note or undertaking, or any sum to be assessed thereon, may be brought and commenced against the maker hereof in the Division Court for the division wherein the head office or any agency of the company is situate.'"

[See Sinclair's D. C. Act, page 88, note (p).]

AN ACT TO AMEND THE ACT TO IMPOSE A TAX  
ON DOGS, AND FOR THE PROTECTION  
OF SHEEP.

48 Victoria, Chapter 46 (Ontario).

[Assented to 30th March, 1885.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

R. S. O. c.  
184, s. 16,  
amended.  
Apportion-  
ment of  
damage.

1. Section 16 of *The Act to impose a Tax on Dogs and for the Protection of Sheep*, chapter 194 of the Revised Statutes, is hereby amended by adding thereto the sub-sections following :

(2) If it shall appear before the court or judge at the trial of any such action for damages, or before such justice at the hearing of the said information or complaint before him, that the damage or some part of the damage sustained by such aggrieved party was the joint act of some other dog or dogs, and of the dog or dogs owned or kept by the person charged in such information or complaint, the court, judge or justice shall have power to decide and apportion the damages sustained by the complainant, among and against the respective owners or keepers of the said dogs, as far as such owners or keepers are known, in such shares and proportions as such court, judge or justice shall think fit, and to award the same by the judgment of the said court or judge, or in the conviction of such justice, on behalf of such aggrieved person.

(3) When in the opinion of the court, judge or justice, the damages were occasioned by dogs the owner or owners of which are known, and dogs the owner or owners of which are unknown, or the owner or owners of which have not been summoned to appear before the court, judge or justice, the court, judge or justice may decide and adjudge as to the proportion of such damages which, having regard to the evidence adduced as to the strength, ferocity and character of the various dogs shewn to have been engaged in committing such damage, was probably done by the dogs the owner or owners of which have been summoned to appear before such court, judge or justice, and shall determine in respect thereof and apportion the damage which such court, judge or justice decides to have been probably done by the dogs whose owners have been summoned, amongst the various owners who have been summoned as aforesaid.

HH

(4) The same proceedings shall be thereupon had against any person found by such judge or justice to be the owner or keeper of the dog or dogs which by such court, judge or justice shall have been found to have contributed to the damage sustained by the person aggrieved, as if the information or complaint had been laid in the first instance against such person.

(5) The court, judge or justice shall not decide and apportion the said damage against any person other than the person in the information or complaint first charged, nor award the same in the said judgment or conviction without such other person having been summoned to appear before such court, judge or justice, and having had an opportunity of calling witnesses.

(6) Appeals from or against any conviction, or order under the said 16th section, or from or against any apportionment or order made under this Act, shall be made to the Division Court holden in the Division in which the cause of action arose, or in which the party complained against, or one of them resided at the time of making the complaint; and the proceedings shall be the same as nearly as may be, as provided by the sections numbered from 50 to 53 of *The Division Courts Act, 1880*.

AN ACT RESPECTING THE PROPERTY OF  
MARRIED WOMEN.

*47 Victoria, Chapter 19 (Ontario.)*

[Assented to 25th March, 1884.]

[Came into force 1st July, 1884.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Married Women's Property Act, 1884.*"

2. (1) A married woman shall, in accordance with the provisions of Short title, this Act, be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2) A married woman shall be capable of entering into and rendering Married herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn.

(4) Every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

3. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation

Property of a woman married after this Act to be held by her as *feme sole*.



in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Execution  
of general  
power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Property  
acquired  
after this  
Act by a  
woman  
married  
before this  
Act to be  
held by  
her as a  
*feme sole*.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

As to stock,  
etc., to  
which a  
married  
woman is  
entitled.

6. All deposits, all sums forming part of public stocks or funds, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shewn, to be the separate property of such married woman; and the fact that any such deposit, sum forming part of public stocks, funds, or of any share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interests, and profits thereof, without the concurrence of her husband, and to indemnify all public officers, and all directors, managers, and trustees of every such corporation, company, public body, or society as aforesaid, in respect thereof.

As to stock,  
etc., to be  
transferred  
etc., to a  
married  
woman.

7. All such particulars mentioned in the preceding section which after the commencement of this Act shall be placed, or transferred in or into, or made to stand, in the sole name of any married woman shall be deemed, unless and until the contrary be shewn, to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not; Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any

Proviso.

shares or stock therein to which any liability may be incident, contrary to the provisions of any statute, charter, by-law, articles of association, or deed of settlement regulating such corporation or company.

8. All the provisions hereinbefore contained as to such particulars mentioned in section 6, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be, or placed, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be placed, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

Investments in joint names of married women and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such particulars named in section 6, which are now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of a married woman, and any other person or persons not being her husband.

As to stock, etc., standing in the joint names of a married woman and others.

10. If any investment in any of the particulars set forth in section 6 shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section 15 of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband, to any gift, by a husband to his wife, of any property, in fraud of his creditors, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any property or moneys so deposited or invested may be followed as if this Act had not been passed.

Fraudulent investments with money of husband.

11. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other.

Remedies of married woman for protection and security of separate property.

12. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage;

Wife's ante-nuptial debts and liabilities.

and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract or wrong, as aforesaid.

Proviso.

Husband to be liable for his wife's debts and other liabilities to a certain extent.

13. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, and for wrongs committed by her after marriage, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceeding at law, in respect of any such debts, contracts or wrongs for or in respect of which his wife is liable; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt or liability shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Proviso.

Suits for wife's liabilities.

14. A husband and wife may be jointly sued in respect of any such debt or other liability (whether for contract or for any wrong) contracted or incurred by the wife as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to

the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

15. (1) In any question between husband and wife as to the title to or possession of property, either party, or any corporation, company, public body, or society in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise, in a summary way, to any judge of the High Court of Justice, or (at the option of the applicant, irrespectively of the value of the property in dispute) to the judge of the county court of the county in which either party resides, and the judge may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit; or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit.

Questions between husband and wife as to property to be decided in a summary way.

(2) Any order of a Judge of the High Court made under the provisions of this section, shall be subject to appeal in the same way as an order made by the same judge in a suit in the said court would be.

(3) Any order of a county court under the provisions of this section, shall be subject to appeal in the same way as any other order made by the same court would be.

(4) All proceedings in a county court, under this section, in which, by reason of the character or value of the property in dispute, such court would not have had jurisdiction if this Act had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court, by writ of *certiorari*, or otherwise, as may be prescribed by any rule of the Supreme Court of Ontario; but any order made or act done in the course of the proceedings, prior to the removal, shall be valid, unless order is made to the contrary by such High Court.

(5) The judge of the High Court or county court, if either party so require, may hear any such application in his private room.

(6) Any such corporation, company, public body, or society, as aforesaid, shall, in the matter of any such application, for the purpose of costs or otherwise, be treated as a stakeholder only.

16. A married woman, who is an executrix or administratrix, alone or jointly with any other person or persons, of the estate of any deceased person, or a trustee alone or jointly as aforesaid, of property subject to any trust, may sue or be sued, and may transfer or join in transferring, in that character, any such particulars as mentioned in section 6, without her husband, as if she were a *feme sole*.

Married woman as an executrix or trustee.

Saving of existing settlements, and the power to make future settlements.

17. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

In what cases a married woman may obtain an order of protection for the earnings of her minor children.

18. (1) Any married woman having a decree for alimony against her husband, or any married woman who lives apart from her husband, having been obliged to leave him from cruelty or other cause which by law justifies her leaving him and renders him liable for her support, or any married woman whose husband is a lunatic with or without lucid intervals, or any married woman whose husband is undergoing sentence of imprisonment in the Provincial Penitentiary or in any goal for a criminal offence, or any married woman whose husband from habitual drunkenness, profligacy, or other cause, neglects or refuses to provide for her support and that of his family, or any married woman whose husband has never been in this Province, or any married woman who is deserted or abandoned by her husband, may obtain an order of protection entitling her, notwithstanding her cohabitation, to have and to enjoy all the earnings of her minor children, and any dispositions therefrom, free from the debts and obligations of her husband and from his control or dispositions, and without his consent, in as full and ample a manner as if she continued sole and unmarried.

Purpose and effect of such order.

(2) The married woman may at any time apply, or the husband or any of the husband's creditors may at any time on notice to the married woman, apply for the discharge of the order of protection; and if an order for such discharge is made the same may be registered or filed like the original order.

How and by whom an order discharging protection may be obtained.

(3) Either order may issue in duplicate, and where the married woman resides in a city or town in which there is a police magistrate, the order for protection or any order discharging the same shall be made by the police magistrate, and shall be registered in the registry office of the Registration Division in which the city or town is situate.

Either order may be in duplicate. By whom to be made in cities and towns. Registration.

(4) Where the married woman does not reside in a city or town in which there is a police magistrate, the order shall be made by the Judge or one of the Judges, or the acting or deputy Judge of the Division Courts or a Division Court of the County in which the married woman resides; and instead of being registered, shall be filed for public inspection with the clerk of the Division Court of the Division within which the married woman resides.

By whom made elsewhere than in city or town.

(5) The hearing of an application for an order of protection, or for an order discharging the same may be public or private, at the discretion of the judge or police magistrate.

Hearing may be public or private.

(6) The order for protection shall have no effect until it is registered or filed, and the registrar or clerk shall immediately on receiving the order endorse thereon the day of registering or filing the same; and a certificate of the registering or filing and date, signed by the registrar or clerk for the time being, shall be *prima facie* evidence of such registering or filing and date; and a copy of the order which is registered or filed, certified under the hand of the registrar or clerk to be a true copy thereof, shall be sufficient *prima facie* evidence of the order without proof of the signature of the registrar or clerk, and without further proof of the order itself, or of the making or validity thereof.

Order not to have effect until registered.

Evidence of order, etc.

(7) The order for discharging an order of protection shall not in any case be retroactive, but shall take effect from the time it is made, and the order for protection shall protect the earnings of the minor children of the married woman until an order is made discharging such order of protection, and the married woman shall continue to hold and enjoy to her separate use whatever, during the interval between the registering or filing of the order of protection and the making of the order discharging the same, she may have acquired by the earnings of her minor children.

From what time the order discharging protection shall take effect.

19. For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Legal representative of married woman.

20. The separate personal property of a married woman dying intestate shall be distributed in the same proportions between her husband and her children as the personal property of a husband dying intestate is to be distributed between his wife and children; and if there be no child or children living at the death of the wife so dying intestate, then such property shall pass and be distributed as if this Act had not passed.

Separate personal property of wife dying intestate, how to be distributed

21. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions

Interpretation. "Contract."

of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by a married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The "Property" word "property" in this Act includes a thing in action.

22. *The Married Woman's Property Act* is hereby repealed: Provided, R. S. O. c. 125; R. S. O. c. 126, s. 6 (in part) and R. S. O. c. 127, s. 3 (in part) and ss. 4-12 repealed. that such repeal shall not affect any act done or right acquired while the said Act was in force, or any right or liability of any husband or wife married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Act, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act; that part of section 8 of *The Married Woman's Real Estate Act*, which follows the words "feme sole" in the tenth line; also sections numbered from 4 to 12 inclusive, and that part of section 6 of the *Revised Statute respecting Dower* which follows the word "dower" in the fourth line, are also repealed.

23. The date of the commencement of this Act shall be the first of Commencement of Act. July, 1884.

NEW RULES, TARIFF OF FEES, FORMS AND  
ORDERS,WHICH CAME INTO FORCE ON THE FIRST DAY OF  
JANUARY, 1885.

We, the undersigned, "the Board of County Judges," acting under and in pursuance of the powers vested in us by the Division Courts Act, have framed the following additional Rules and Orders to be in force from and after the first day of January, A. D. 1885, until otherwise ordered;

And we do certify the same under the provisions of the 239th section of the said the Division Courts Act accordingly.

## RULES.

No. 181.—From and after the first day of January, 1885, Rule No. 171, of the additional Rules and Orders of the 28th day of November, 1879, and Form 129, and Schedule of Clerks' Fees (Form 130), and Schedule of Bailiffs' Fees, (Form 131), shall be rescinded; and the fees set forth in the tariff hereto annexed, marked Schedule of Clerks' Fees (Form 133) and Schedule of Bailiffs' Fees (Form 134), shall be the fees to be received by the several Clerks and Bailiffs of Division Courts in Ontario for and in relation to the duties and services to be performed by them as officers of the said Courts, and shall be in lieu of all other fees heretofore receivable.

No. 182.—Rule No. 179 and Form 129 are hereby rescinded from and after the said first day of January, 1885, and Form No. 182 is substituted for the said Form No. 129.

No. 183.—Rule No. 178 is hereby amended by substituting for the words and figures "Form 129," the words and figures "Form 132."

No. 184.—All summary applications to a Judge in Chambers other than applications for new trials under Rule No. 142, may be made on notice or by summons.



## FORMS OF BILLS OF COSTS.

## FORM 182.

BILL OF COSTS upon a claim, for say \$20 up to and including judgment entered by the Clerk upon special summons, no notice of defence being given.

*Clerk's Fees.*

Receiving claim, numbering and entering in Procedure Book...	\$0 15
Issuing Summons with necessary notices and warnings thereon.	0 40
Copy of summons, including all notices and warnings thereon..	0 20
Receiving and entering Bailiff's return to summons.....	0 15
Affidavit of service and administering oath to the deponent....	0 25
Notice to Plaintiff, when defendant has failed to give notice of defence, 15c.; postage and registration 5c.....	0 20
Entering final judgment by the Clerk.....	0 50
Total Clerk's fees.....	<u>\$1 85</u>

*Bailiff's Fees.*

Service of summons.....	\$0 30
Return of service and attending Clerk's office to make necessary affidavit.....	0 15
Total Bailiff's fees.....	<u>0 45</u>
Total costs.....	<u>\$2 30</u>

Taxed this day of 18 .

*Clerk.*

BILL OF COSTS upon claim for say, \$60.00, defended, cause tried, and judgment entered for plaintiff with costs:

*Clerk's Fees.*

Receiving claim, &c.....	\$0 15
Issuing summons, &c.....	0 50
Copy of summons, &c.....	0 20
Receiving and entering Bailiff's return, &c.....	0 15

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Affidavit of service, &c.....	\$0 25
Entering and noting defence, &c., in Procedure Book.....	0 25
Subpœna to witness .....	0 15
Three copies.....	0 15
Notice of defence, &c., to plaintiff, and mailing same, 15c; postage and registration, 5c.....	0 20
Recording and entering judgment rendered at the hearing.....	0 50
<b>Total Clerk's Fees .....</b>	<b>\$2 50</b>

*Bailiff's Fees.*

Service of summons, &c.....	\$0 40
Attending to return, &c.....	0 15
Service of subpœna (3 witnesses).....	0 45
Calling parties and their witnesses .....	0 15
<b>Total Bailiff's fees.....</b>	<b>1 15</b>
<b>Total costs.....</b>	<b>\$3 65</b>

Taxed this day of 18 .

*Clerk.*

N. B.—Mileage and fees to witnesses, if any, to be added.

FORM 133.

SCHEDULE OF CLERKS' FEES.

- Receiving claim, numbering and entering in Procedure Book.....\$0 15  
(This item to apply to entering in the procedure book a transcript of judgment from another court, but not an entry made for the issue of a judgment summons.)
- Issuing summons with necessary notices and warnings thereon, or judgment summons (as provided in the forms), in all,
 

Where claim does not exceed \$20.....	0 40
“ “ exceeds \$20 and does not exceed \$60.....	0 50
“ “ exceeds \$60 and does not exceed \$100.....	0 60
“ “ exceeds \$100.....	1 00

[N. B.—In replevin and interpleader suits the value of goods to regulate the fee.]

8. Copy of summons, including all notices and warnings thereon... \$0 20
4. Copy of claim (including particulars), when not furnished by plaintiff (to be paid by the plaintiff)..... 0 20
5. Copy of set-off (including particulars), when not furnished by the defendant (to be paid by the defendant)..... 0 20
6. Receiving and entering Bailiff's return to any summons, writ or warrant issued under the seal of the Court (except summons to witness and return to summons, or papers from another Division) ..... 0 10
7. Entering and noting every defence or notice of admission in Procedure Book ..... 0 25  
(To be paid in the first instance by the defendant or other person entering it—but it may be afterwards taxed against the plaintiff should costs be given against him.)
8. Taking confession of judgment..... 0 10  
(This does not include affidavit and oath, chargeable under item 9.)
9. Every necessary affidavit, if actually prepared by the Clerk, and administering oath to the deponent..... 0 25
10. Copies of papers for which no fee is already provided—necessarily required for service or transmission to the Judge—each... 0 10
11. Every notice of defence or admission entered, or other notice required to be given by the Clerk to any party to a cause or proceeding, or to the Judge in respect to the same, and mailing.... 0 15
12. Entering final judgment by Clerk, on special summons, where claim not disputed..... 0 50
13. Entering every judgment rendered at the hearing, or final order made by the Judge..... 0 50  
[This one fee of 50 cts. will include the service of recording at the trial and afterwards entering in the procedure book the judgment, decree and order in its entirety, rendered or made at the trial. In a garnishee proceeding before judgment, the fee of 50 cts. will be allowed for the judgment in respect to the primary debtor, and a like fee of 50 cts. for the adjudication whenever made in respect to the garnishee.]

14. Subpœna to witness ..... \$0 15  
 (The Subpœna may include any number of names therein, and only one original subpœna shall be taxed, except the Judge otherwise orders.)
15. For every copy of Subpœna required for service ..... 0 05
16. Summons for each juryman, when called by the parties ..... 0 10  
 (Only 25 cts. in all is to be allowed for returning a Judge's jury.)
17. Every order of reference or order for adjournment made at hearing and every order requiring the signature of the Judge, and entering the same .... 0 25  
 (Any warning necessary with order, *e. g.*, the warning in form 42, forms part of the order.)
18. Transcript of judgment (under sections 161 or 165) ..... 0 25
19. Every writ of execution, warrant of attachment, or warrant for arrest of delinquent and delivering same to Bailiff ..... 0 50
20. Renewal of every writ of execution when ordered by the judgment creditor ..... 0 15
21. Every bond when necessary and prepared by the Clerk (including affidavit of justification) ..... 0 50
22. For necessary entries in the debt attachment book in each case (in all) ..... 0 20
23. Transmitting transcript of judgment ; or transmitting papers for service to another division, or to Judge on application to him, including necessary entries, but not postage ..... 0 25
24. Receiving papers from another division for service, entering the same, handing to the Bailiff, receiving and entering his return, and transmitting the same (if return made promptly, not otherwise) ..... 0 30  
 (This fee does not include a charge for receiving transcript of judgment, for which a fee of 15 cents is taxable under item 1.)
25. Search by person not party to the suit or proceeding, to be paid by the applicant, 10c. ; search by party to the suit or proceeding where service is over one year old ..... 0 10  
 (No fee is chargeable for search to a party to the suit or proceeding, if the same is not over one year old.)
26. Taxing costs in defended suits ..... 0 25

## FORM 134.

## SCHEDULE OF BAILIFFS' FEES.

1. Service of summons, writ or warrant, issued under the seal of the Court, or Judge's summons on each person (except summons to witness and summons to juryman):
 

Where claim does not exceed \$20.....	\$0 30
“ “ exceeds \$20 and does not exceed \$60.....	0 40
“ “ “ \$60 and does not exceed \$100.....	0 50
“ “ “ \$100.....	0 75

[In interpleader suits the value of the goods to regulate the fee]
2. For every return as to service of summons, attending at the Clerk's office and making the necessary affidavit (as provided by Rule 90)..... 0 15
3. Service of summons on witness or juryman, or service of notice.. 0 15
4. Taking confession of judgment and attending to prove..... 0 10
5. For calling parties and their witnesses at the sittings of the Court in every defended case, as provided by Rule 91, amended by Rule 168..... 0 15
6. Enforcing every writ of execution, or summons in replevin, or warrant of attachment, or warrant against the body,—each
 

Where claim does not exceed \$20.....	0 50
“ “ exceeds \$20 and does not exceed \$60.....	0 75
“ “ “ \$60.....	1 00

(Executing summons in replevin, includes service on defendant. The value of the goods to regulate the amount of the fee.)
7. Every mile necessarily travelled to serve summons or process, or other necessary papers, or in going to seize on attachment, or in going to seize on a writ of execution, where money made or case settled after levy..... 0 12
 

(In no case is mileage to be allowed for a greater distance than from the Clerk's office to the place of service or seizure.)
8. Mileage to arrest delinquent under a warrant to be at 12 cents per mile, but for carrying delinquent to prison, including all expenses and assistance, per mile.... 0 20
9. Every schedule of property seized, attached or replevied, including affidavit of appraisal, when necessary,

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Not exceeding \$20.....	0 30
Exceeding \$20 and not exceeding \$60.....	0 50
Exceeding \$60 .....	0 75
10. Every bond when necessary, when prepared by the Bailiff, (including affidavit of justification.).....	0 50
11. Every notice of sale not exceeding three, under execution or under attachment, each.....	0 15
12. There shall be allowed to the Bailiff, for removing or retaining property seized under execution or attached, reasonable and necessary disbursements and allowances, to be first settled by the Clerk, subject to appeal to the Judge.....	
13. There shall be allowed to the Bailiff five per cent. upon the amount realized from the sale of property under any execution, but such percentage not to apply to any overplus thereon.....	
(But if execution be satisfied in whole or in part after seizure and before sale, the Bailiff to be entitled to charge and receive three per cent. on the amount realized.)	

S. J. JONES,  
*County Judge, County of Brant.*

D. J. HUGHES,  
*County Judge, Elgin.*

JAMES DANIELL,  
*County Judge, Prescott and Russell.*

J. S. SINCLAIR,  
*County Judge, Wentworth.*

*Approved 15th December, 1884.*

ADAM WILSON, C.J., Q.B.D.  
M. C. CAMERON, C.J., C.P.  
THOMAS GALT, J.  
JOHN E. ROSE, J.

## FORMS.

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### FORM OF ORDER UNDER SECTIONS 144 AND 145 OF THE DIVISION COURTS ACT, WHERE A THIRD PARTY CLAIMS THE DEBT GARNISHED.

In the      Division Court for the County of  
BETWEEN      A. B., Primary Creditor,  
                                and  
                                C. D., Primary Debtor,  
                                and  
                                E. F., Garnishee.

Upon reading the summons issued in this cause, and upon hearing the primary creditor [the primary debtor] and the garnishee:

It is ordered that the further hearing of the parties to the said summons herein do stand adjourned until the      day of      A. D. 188      at  
[or "the next sittings of this Court,"] and that G. H., claiming to be entitled to the said debt, the primary creditor, the primary debtor, and the garnishee, their solicitors or agents, attend before the presiding Judge at the next sittings of this Court, at      on the      day of      A. D. 188      at ten o'clock in the forenoon of the same day (or such other time as may be appointed), and state the nature and particulars of their respective claims to such debt, and maintain or relinquish the same, and abide by such order as may by the said presiding Judge be made herein, and therefor that all necessary amendments may be made in the proceedings herein.

Dated, etc.

Judge.

[In a case of *Cowan v. Carlill*, 79 *Law Times (Journal)* 408, it was held that where nothing could be made on execution against a garnishee, the latter could be brought up under the Judicature Act as a "debtor," and examined as to what debts were owing to him and what property or means he had of satisfying the debt.]

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### SUMMONS TO DEFENDANT AFTER JUDGMENT.

**To the above named defendant:**

It is also adjudged that the said E. F. (the claimant) has sustained



damages arising, or capable of arising, out of the execution of the process by which said goods (or as the case may be) were taken in execution (or attached) to the amount of \$                      and that the same is recoverable from and payable by A. B. (the execution creditor, or L. M., the Bailiff), to the said E. F. (the claimant), and which said sum is hereby ordered to be paid forthwith (or as the case may be).

It is further ordered that the costs of the said interpleader proceeding and of the said claim for damages be paid by (here insert such order as the Judge may have made as to costs in each of these two proceedings), in                      days.

[See ante pages 136-138, as to the subject generally, and as to the necessity for preferring claim for damages in interpleader proceedings see page 159 ante.]

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**FORM OF ADJUDICATION ON INTERPLEADER WHERE DAMAGES  
CLAIMED UNDER SECTION 6 OF THE D. C. ACT, 1885,  
AND DISALLOWED.**

Adjudged, that the goods [or, the goods, chattels and moneys, or proceeds of the goods, etc. (as the case may be).] mentioned in the (within) interpleader summons [if only for a part of the goods, etc., add the words, "hereinafter mentioned, that is to say," (here enumerate them) are the property of E. F. (the claimant).

It is also adjudged that the said E. F. (the claimant,) has not sustained any damages arising, or capable of arising, out of the execution of the process by which said goods (or as the case may be) were taken in execution (or attached).

It is further ordered that the costs of the said interpleader proceeding and of the claim for damages be paid by (here insert such order as the Judge may have made as to costs in each of these two proceedings), in                      days.

[As to costs see ante pages 151-156.]

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